The Commonwealth of Massachusetts

# REPORT

OF THE

# ATTORNEY GENERAL

FOR THE

Year Ending June 30, 1988

PUBLICATION OF THIS DOCUMENT APPROVED BY RIC MURPHY, STATE PURCHASING AGENT

*To the Honorable Senate and House of Representatives:*

I have the honor to transmit herewith the Report of the Department of the Attorney General for the year ending June 30, 1988.

Respectfully submitted,

JAMES M. SHANNON
Attorney General

# DEPARTMENT OF THE ATTORNEY GENERAL

*ATTORNEY GENERAL*
JAMES M. SHANNON

*First Assistant Attorney General*
Gerald T. Fitzgerald

*Assistant Attorneys General*

Richard Allen
Dorothy Anderson
Linda Andros
Barbara Anthony[59]
Thomas Barnico
Judith Beals[25]
Max Beck[22]
Susan Beck
Patricia Bernstein[32]
Annette Benedetto[63]
Susan Bernard[53]
Despena Billings
Edward Bohlen
Phinorice Boldin[10]
Mark Bourbeau
Ruth Bourquin[42]
Kenneth Bowden
Philip Boxell, Jr.[32]
Lee Breckenridge
Tommy Brewer
Donald Bronstein[55]
Richard Brunnell
Edward Cadieux[62]
Cynthia Canavan[70]
Eric Carriker
Douglas Carrey-Beaver[15]
James Caruso
Michael Cassidy[43]
Apolo Catala
Rosanna Cavallaro[19]
Francis Chase
Karen Cheeks-Lomax[8]
Mary Connaughton[46]
Cheryl Connor[62]
John Corbett[10] [69]
Harvey Cotton
Mark Coven
Cheryl Cronin[15]
Kevan Cunningham[9]
Leslie Curley[28]
Stacey Cushner[36]
Richard Dalton
Alice Daniel
Joyce Davis[26]
Kimberly Davis[26]
George Dean
Paula DeGiacomo
Susan DeMatteo[60]
Elaine Denniston[71]
Mary DeNevi
Ian DeWaal[32]
Barbara Dickey[26]
Carol Dietz
Robert diGrazia[66]
Daniel Dilorati[36]
Michael Dingle
John Donohue[60]
Elizabeth Donovan
Raymond Dougan
Suzanne Durrell
Joseph Early[40]
Judith Fabricant[34]
Susan Fendell
Allan Fierce
Lawrence Fletcher-Hill[9]
Maria Galvagna[39]
Paul Glickman[78]
Steven Goldberg
Susan Goldfischer
William Gottlieb[9]
Sydney Hanlon
Nancy Harper[38]
Deirdre Harris[31]
Jon Hartmere
Sandra Hautanen[35]
Lila Heideman[9]
Deborah Hiatt
Virginia Hoefling
Jeffrey Hurwit[54]
Tung Huynh
Stephen Jonas
Edmund Joyal[1]
Michelle Kaczynski
David Kaplan[11] [65]
John Karagounis
Stephen Karnas
Linda Katz
Gerald Kelley[2]
Robert Kilmartin[29]
Maria Kyranos-Mendros[61]
Marek Laas
Raymond Lamb
John Landry[56]
Loren Lang[20]
Marc Laredo
Nathaniel Lawrence
Paul Lazour
Virginia Lee
Antoinette Leoney[50]
Lisa Levy
Timothy Linnehan[20]
Maria Lopez[58]
Alycia Lyons[32]
Kenneth Luke[73]
Samuel Marcellino[58]
Jesse Markham[74]
Michael Marks
Milton Marquis[7]
Michael Mascis[14]
Suzanne Matthews
Janet McCabe
Lawrence McCarthy
Kevin McGrath[33]
Susan McHugh
William McVey
Gary Mena
Robert Mendillo
Janet Menna[31]
Pamela Merchant
Paul Merry
James Milkey
William Mitchell
Eric Mogilnicki
Alice Moore
Kathleen Moore[21]
Madelyn Morris[28]
Mark Muldoon
Sherry Mulloy
Kim Murdock[56]
Henry O'Connell[68]
Stephen Oleskey
Jerrold Oppenheim
Gwen O'Sullivan[27]
Frank Ostrander[76]
Howard Palmer
A. John Pappalardo
William Pardee
Nadine Pellegrini[5]
Kathleen Pendergast
Anthony Penski[43]
Carmen Picknally
Maria Pizarro-Figueroa[16]
Stephen Poitrast
Nancy Preis[13]
Richard Rafferty[64]
T. David Raftery
Jamin Raskin[18]
Susan Roberts
Carmen Rodriguez[17]
Abbe Ross[44]

Hilary Rowen
Joan Ruttenberg
Peter Sacks[45]
Carole Sakowski
Judith Saltzman
Ernest Sarason[24]
Richard Savignano
Jane Schacter
Mark Schmidt
Roberta Schnoor
Douglas Schwartz[23]
Phyllis Segal
Kathleen Sheehan
Margaret Sheehan
Robert Sherman[27]
Brison Shipley
Natalea Skvir
Carol Sneider
Dianne Solomon
Donna Sorgi
Johanna Soris
Paul Stein[3]
Lauren Stiller-Rikleen[75]
Mark Sutliff
Pamela Talbot[43]
Deborah Thomson[72]
Edward Toro[30]
Michael Tracy
John Traficonte[4]
Diane Tsoulas[57]
Frances Tucker[41]
Gwendolyn Tyre[35]
Carl Valvo
Charles Walker[52]
Robert Ward[6]
George Weber[37]
Madelyn Wessel[2]
James White
William White[9]
Douglas Wilkins
Countess Williams[12]
Gregg Wilson[9] [73]
H. Reed Witherby
Carolyn Wood
Steven Wright
Sarah Wunsch[18]
Harry Yee
Andrew Zaikis
Margaret Zaleski
Reed Zars
Judith Zeprun[16]
Stephen Ziedman[51]
Peter Zuk

*Assistant Attorneys General Assigned To Division of Employment Security*

Ann Marie Irwin[77]
William Luzier
Maria Moynihan[27]
Wendy Thaxter[67]

*Chief Clerk*
Edward J. White

*Budget Director*
Patrick J. Moynihan

*Fiscal Affairs Manager*
Elizabeth M. Connolly

## APPOINTMENT DATE

1. 7/1/87
2. 7/6/87
3. 7/9/87
4. 7/13/87
5. 7/15/87
6. 7/21/87
7. 7/27/87
8. 7/30/87
9. 8/3/87
10. 8/10/87
11. 8/13/87
12. 8/17/87
13. 8/21/87
14. 8/24/87
15. 8/31/87
16. 9/1/87
17. 9/3/87
18. 9/14/87
19. 9/21/87
20. 9/28/87
21. 10/5/87
22. 10/13/87
23. 10/16/87
24. 10/19/87
25. 10/20/87
26. 10/26/87
27. 11/2/87
28. 11/9/87
29. 11/16/87
30. 11/23/87
31. 11/30/87
32. 2/1/88
33. 2/16/88
34. 3/1/88
35. 3/7/88
36. 3/14/88
37. 4/11/88
38. 4/13/88
39. 4/25/88
40. 5/2/88
41. 5/9/88
42. 5/25/88
43. 5/31/88
44. 6/1/88
45. 6/6/88
46. 6/13/88

## TERMINATION DATE

50. 7/6/87
51. 7/10/87
52. 7/17/87
53. 7/21/87
54. 7/31/87
55. 8/28/87
56. 9/11/87
57. 9/18/87
58. 9/25/87
59. 9/30/87
60. 10/30/87
61. 11/25/87
62. 11/30/87
63. 1/22/88
64. 1/29/88
65. 2/12/88
66. 2/26/88
67. 3/11/88
68. 3/31/88
69. 4/1/88
70. 4/20/88
71. 4/22/88
72. 4/29/88
73. 4/30/88
74. 5/2/88
75. 5/24/88
76. 6/1/88
77. 6/10/88
78. 6/15/88

# DEPARTMENT OF THE ATTORNEY GENERAL
## STATEMENT OF FINANCIAL POSITION
## FOR FISCAL YEAR ENDED
## JUNE 30, 1988

| *Account* | *Account Name* | *Appropriation* | *Expenditures* | *Advance* | *Encumbrances* | *Balance* |
|---|---|---|---|---|---|---|
| 0810-0000 | Administration | $15,064,685.23 | $14,419,595.93 | — | — | $ 645,089.30 |
| 0810-0014 | Public Utilities Auth. by CH. 1221 1973 | 500,000.00 | 497,918.69 | — | — | 2,081.31 |
| 0810-0015 | Seabrook Litigation Adm. & Exp. | 420,773.00 | 345,222.68 | — | — | 75,550.32 |
| 0810-0017 | Judicial Proceedings, relevant to Fuel Charge | 81,101.91 | 64,123.91 | — | — | 16,978.00 |
| 0810-0021 | Medicaid Fraud Control Unit | 1,597,498.00 | 1,535,862.91 | — | — | 61,635.09 |
| 0810-0031 | Local Consumer Aid Fund | 730,551.00 | 722,282.20 | — | — | 8,268.80 |
| 0810-0032 | Local Consumer Aid Fund Deposit | 121,507.53 | 121,507.53 | — | — | — |
| 0810-0035 | Antitrust Div. Adm. | 430,970.00 | 346,642.41 | — | — | 84,327.59 |
| 0810-0201 | Insurance Auth. by Ch 266, 1976 | 400,000.00 | 388,228.61 | — | — | 11,771.39 |
| 0810-0410 | Forfeited Funds | 224,711.96 | 223,151.06 | — | — | 1,560.90 |
| 0810-1031 | Victim/Witness Discretionary Allocation of 0840-0105 | 112,850.00 | 76,210.26 | — | — | 36,639.74 |
| | TOTALS | $19,734,868.16 | $18,740,746.19 | — | — | $ 994,121.97 |
| Schedule 2 | TOTALS | $ 97,264.00 | $ (226,838.00) | — | — | $ 324,102.00 |
| | GRAND TOTALS | $19,832,132.16 | $18,513,908.19 | — | — | $1,318,223.97 |

# DEPARTMENT OF THE ATTORNEY GENERAL
## GRANTS AND TRUSTS
## RECEIPTS AND DISBURSEMENTS
## JULY 1, 1987 to JUNE 30, 1988

| | *Account Number* | *Balance July 1, 1987* | *Receipts* | *Disbursements* | *Balance June 30, 1988* |
|---|---|---|---|---|---|
| Attorney General Trust Fund | 0810-6614 | $66,537.18 | $2,861,011.60 | $2,846,821.60 | $ 80,727.18 |
| Water Pollution Control Program | 0810-6630 | 1.08 | 127,134.88 | 48,804.51 | 78,331.45 |
| Air Pollution Control Program | 0810-6631 | 24.10 | 26,507.55 | 11,009.07 | 15,522.58 |
| Anti-Trust Enforcement Program | | | | | |
| New England Bid Monitoring Project | 0810-6643 | 152.17 | — | — | 152.17 |
| Hazardous Waste Enforcement | 0810-6647 | — | 39,334.52 | 20,515.37 | 18,819.15 |
| Anti-Drug Abuse Act 1986 | 0810-6648 | — | 100,000.00 | — | 100,000.00 |
| Coastal Zone Management Program Implementation | 0810-6661 | 2,693.47 | — | — | 2,693.47 |
| Pesticide Regulation Program Enforcement Activities | 0810-6662 | 27,856.00 | — | — | 27,856.00 |
| TOTALS | | $97,264.00 | $3,153,988.55 | $2,927,150.55 | $324,102.00 |

SUSPENSE FUNDS
RECEIPTS AND DISBURSEMENTS
JULY 1, 1987 to JUNE 30, 1988

| *Name* | *Account Number* | *Balance July 1, 1987* | *Receipts* | *Disbursements* | *Balance June 30, 1988* |
|---|---|---|---|---|---|
| Thomas C. McMahon v. Nyanza | 0810-6732 | $ 3,679.42 | — | — | $ 3,679.42 |
| J.T. Geanese d/b/a King B Auto | 0810-6774 | 10,500.00 | — | — | 10,500.00 |
| Chrysler Corp. | 0810-6784 | 10,000.00 | — | — | 10,000.00 |
| Patrick Ciampo & Howard Johnson a/k/a Edward Miller | 0810-6793 | 7,106.25 | — | — | 7,106.25 |
| Robert Wilcox d/b/a Roberts Auto | 0810-6805 | 1,000.00 | — | — | 1,000.00 |
| Wm. M. Johnson III & JG Salvage | 0810-6808 | 2,646.84 | — | — | 2,646.84 |
| Steven Sesser Construction Co. Wonder Construction Co. | 0810-6811 | 380.00 | — | — | 380.00 |
| Paul Solas, T. William Sola d/b/a Center Rehabilitation | 0810-6813 | 1,817.71 | — | — | 1,817.71 |
| Allen C. Keene, et al | 0810-6819 | 2,842.63 | — | — | 2,842.63 |
| Fiore Depot Motors, Inc. | 0810-6829 | 12,700.00 | — | — | 12,700.00 |
| Janet Strom Enterprises, et al | 0810-6836 | 487.00 | — | — | 487.00 |
| Bennett St. Auto Sales, Inc. | 0810-6841 | 4,996.46 | — | — | 4,996.46 |
| Dean St. Auto Sales, Inc. & Kenneth Troiani | 0810-6842 | 8,547.79 | — | — | 8,547.79 |
| Stephen Hamparian d/b/a Comm. Tow & Repair | 0810-6843 | 1,261.00 | — | — | 1,261.00 |
| Majestic Auto Buyers, Inc. | 0810-6850 | 19,500.00 | — | $ 10,000.00 | 19,500.00 |
| Olympia Auto Sales | 0810-6857 | 11,430.50 | — | 1,428.25 | 10,002.25 |
| Festino Fuel, Inc. Joseph & Vicent Festino | 0810-6859 | 1,000.00 | — | — | 1,000.00 |
| H.J. Wassar Co., Inc. | 0810-6861 | 149.00 | — | — | 149.00 |
| Century Auto Appraisers, Inc. RP Stone & Peter Slate | 0810-6862 | 2,000.00 | 4,800.00 | — | 6,800.00 |
| Boston Bullion Ltd., et al. | 0810-6864 | 2,400.00 | — | — | 2,400.00 |
| Porter Chevrolet | 0810-6866 | 2,245.05 | — | — | 2,245.05 |
| American Income Life | 0810-6876 | 5,456.02 | — | — | 5,456.02 |
| Pampalone Music School, Inc., v. Pampalone | 0810-6877 | 46.50 | — | — | 46.50 |
| Leonidas & Ralph Benzan d/b/a Tropicana Oil Co. | 0810-6878 | 1,000.00 | — | — | 1,000.00 |
| Richard O'Riley d/b/a O'Riley Auto & Rosco Auto Parts, Inc. | 0810-6880 | 7,499.25 | — | — | 7,499.25 |
| Maria Monge d/b/a J&R Auto Repair & Used Cars | 0810-6881 | 19,500.00 | — | — | 19,500.00 |
| Feel Fit Health Center Ltd. & Edward P. Matter | 0810-6882 | 270.44 | — | — | 270.44 |
| G.A. Mulloy, Inc. d/b/a Car Wholesaler | 0810-6883 | .48 | — | — | .48 |
| Alfred J. Fabrit & Brian R. Dimetres | 0810-6884 | 12,320.00 | — | — | 12,320.00 |
| Eric Bartlett d/b/a Bartlett Assoc. & Fix.. Co. | 0810-6885 | 2,000.00 | — | — | 2,000.00 |

| | | | | | |
|---|---|---|---|---|---|
| Bruce Ledbury d/b/a Cars International | 0810-6887 | 20,120.80 | 5,300.00 | 14,134.20 | 11,286.60 |
| Ozzella Dodge Sales | 0810-6888 | 21,000.00 | — | — | 21,000.00 |
| Franklin Lama | 0810-6893 | 1,000.00 | — | — | 1,000.00 |
| US Savings Subaru | 0810-6894 | .63 | — | — | .63 |
| Vurhoc Ins. Rest. Acct | 0810-6896 | 4,778.30 | — | — | 4,778.30 |
| Yenom Auto Sales, Inc., et al. | 0810-6898 | 9,000.00 | — | — | 9,000.00 |
| Aetna Finance d/b/a Itt Thorp Co. | 0810-6902 | 1,251.40 | 50.68 | — | 1,302.08 |
| Leland Powers School Settlement | 0810-6904 | 5.79 | — | — | 5.79 |
| Andrew Paint Co., FG Andrews | 0810-6905 | 500.00 | 1,300.00 | 1,304.50 | 495.50 |
| Cabot Mtg. Corp. | 0810-6906 | 375.75 | — | — | 375.75 |
| Alex O'Neil | 0810-6908 | 250.00 | — | — | 250.00 |
| Theodore Nader d/b/a Nadar Auto | 0810-6910 | 2,500.00 | — | — | 2,500.00 |
| Falmouth Auto | 0810-6911 | .02 | — | — | .02 |
| Robertson & Gray, Inc. | 0810-6913 | 2,000.01 | — | — | 2,000.01 |
| Hodgen Rest Homes | 0810-6914 | 18,916.99 | — | 9,411.02 | 9,505.97 |
| North Shore Roommates Service | 0810-6915 | 1,088.39 | — | — | 1,088.39 |
| Diamond Chevrolet | 0810-6917 | 7,396.00 | — | — | 7,396.00 |
| Charlie Construction | 0810-6918 | 891.38 | — | — | 891.38 |
| Rusty Jones, Inc. | 0810-6919 | 2,263.00 | — | — | 2,263.00 |
| FIC Assoc./Carter Green Condos. | 0810-6920 | 19,455.03 | — | — | 19,455.03 |
| Business Education | 0810-6921 | 116,298.81 | — | — | 116,298.81 |
| O'Henry's Used Cars | 0810-6922 | 10,100.00 | 200.00 | 1,300.00 | 9,000.00 |
| Forest Mtg. Group | 0810-6923 | 10,000.00 | 5,000.00 | 14,950.00 | 50.00 |
| Mall Auto Sales | 0810-6924 | 15,000.00 | — | — | 15,000.00 |
| Economy Auto Sales | 0810-6925 | 7,136.60 | . | — | 7,136.60 |
| Wilmington Sales & Lowell Ford | 0810-6927 | 180,000.00 | — | 47,348.42 | 132,651.58 |
| Home Mtg. Corp. | 0810-6929 | 170,566.57 | — | 61,231.85 | 109,334.72 |
| Womens World Health Spa | 0810-6930 | — | 20,000.00 | — | 20,000.00 |
| Casey Chevrolet | 0810-6931 | 5,000.00 | — | 1,500.00 | 3,500.00 |
| Charlesbank Dry Cleaning | 0810-6932 | 900.00 | — | 802.74 | 97.26 |
| Village Truck | 0810-6934 | 3,000.00 | 68.82 | — | 3,068.82 |
| Fitness Dynamics | 0810-6935 | 1,034.00 | — | 1,034.00 | — |
| Second Chance Cars | 0810-6936 | 500.00 | — | — | 500.00 |
| T.C. Sweeney | 0810-6937 | 1,000.00 | 2,825.00 | 3,825.00 | — |
| Dura Bulb Lighting Prod | 0810-6938 | 1,997.22 | 5,029.59 | 6,999.03 | 27.78 |
| Frank Wing d/b/a Tri-City Realty | 0810-6940 | — | 5,000.00 | 5,000.00 | — |
| Mario Chiepoghio d/b/a Lee Auto | 0810-6941 | — | 3,202.00 | — | 3,202.00 |
| Polaris Physical Conditioning Studios - Burlington | 0810-6942 | — | 6,000.00 | 5,859.13 | 140.87 |
| TOTALS | | $810,109.03 | $38,776.09 | $186,128.14 | $662,756.98 |

# DEPARTMENT OF THE ATTORNEY GENERAL
## STATEMENT OF INCOME
For Fiscal Year Ended
June 30, 1988

| *Account Number* | | |
|---|---|---|
| 0801-40-01-40 | Fees, Filing Reports, Charitable Organizations | $ 248,910.00 |
| 0801-40-02-40 | Fees, Registrations, Charitable Organizations | 56,305.00 |
| 0801-41-02-40 | Fines & Penalties, Civil Actions | 759,611.59 |
| 0810-62-01-40 | Reimbursement for Cost of Investigations- Civil | 42,852.75 |
| 0810-62-02-40 | Reimbursement for Cost of Investigations - Consumer | 18,525.00 |
| 0801-62-03-36 | Local Consumer Aid Fund - Reimburse for Service | 107,000.00 |
| 0801-65-09-36 | Fuel Assessment | 80,922.62 |
| 0801-67-67-40 | Reimbursement, Indirect Cost Allowances | 308,251.00 |
| 0801-67-01-40 | Reimbursement, For Service | 1,171,502.00 |
| 0801-68-04-36 | Forfeitures | 0.00 |
| 0801-69-99-40 | Miscellaneous | 1,123,953.99 |
| | TOTAL INCOME | $4,017,833.95 |

# COMMONWEALTH OF MASSACHUSETTS

In accordance with the provisions of Section 11 of Chapter 12 and of Section 32 of Chapter 30 of the General Laws, I hereby submit the Annual Report for the Department of the Attorney General. This annual report covers the period from July 1, 1987 to June 30, 1988 and is the second report I have filed as the Attorney General of the Commonwealth of Massachusetts.

Fiscal 1988 was the first full year of my term in office. By June of 1987, the transition team had successfully completed its work of staffing and developing the various legal directions this department would take. Along with the creation of several new divisions and reorganized bureaus a solid foundation had been built for the work ahead.

My top priority was rebuilding the Criminal Bureau which now includes six divisions—Narcotics, Public Integrity, Special Prosecutions, Victim Compensation, Division of Employment Security and the Criminal Appellate Division. The growing problem of drug abuse and drug dealing crossing county lines mandated that the newly created Narcotics Division develop the capacity to handle multi-jurisdictional, long-term drug trafficking cases. The division established an impressive first-year record of 32 cases involving 63 defendants, including 48 cocaine traffickers, and the seizure of more than 12-thousand grams of cocaine.

This introduction can't begin to highlight the many accomplishments of the entire Criminal Bureau, but it should be noted here that the Public Integrity Division brought a number of significant cases in an attempt to increase the accountability of public officials to the citizens of Massachusetts.

The Nuclear Safety Unit (NSU), created to represent the citizens of Massachusetts on safety issues surrounding the Pilgrim, Vermont Yankee and Seabrook nuclear power plants, focused this fiscal year primarily on preventing the issuance of a low-power license to the Seabrook Nuclear Power Plant in New Hampshire. Every other week, for nine months, NSU attorneys represented the citizens of Massachusetts at federal hearings called on the New Hampshire Radiological Emergency Response Plans. My view of the legal responsibility of the Atomic Safety and Licensing Board (ASLB) differed significantly from that of the plant owners. I made clear in my testimony before that board on October 5, 1987, that how the board viewed its role in reviewing an emergency plan would be critical to the outcome of this case. My position was that their responsibility was to determine whether or not this plan would protect the public. The plant owners, on the other hand, contended that their job was simply to ensure that there was a plan. My belief, based on the Nuclear Regulatory Commission's adoption of an emergency planning rule in the wake of the Three Mile Island accident in 1979, was that an adequate plan must afford a meaningful level of protection to the public. Submitting hundreds of pages of testimony and exhibits provided by expert witnesses, our attorneys argued that the New Hampshire plan does not adequately protect the public health and safety. As the year ended, a decision was expected in the fall.

The other significant event concerning Seabrook occurred when the NRC amended its emergency planning rules. The change adopted by the NRC was designed to circumvent the constitutional rights and police powers of state and local governments. The rule change purported to permit a nuclear power plant, such as Seabrook, to operate even if state and local governments determine in good faith that local roadways or other such conditions make it impossible for the public to be safely evacuated in case of a nuclear accident. I personally appealed that ruling to the

First Circuit of the U.S. Court of Appeals in Boston arguing it was arbitrary and capricious and a gross violation of the NRC's mandate to protect public safety. As the year ended that decision was under advisement.

Fiscal Year 1988 was also the year increased penalty provisions for most of the state's environmental laws went into effect. It was largely through the lobbying efforts of our attorneys and legislative staff that this important legislation finally passed. Under the new provisions, the Environmental Protection Division responded to growing concern over air quality by bringing several successful cases involving companies emitting volatile organic compounds.

I am gratified to report that we have aggressively enforced the rule which says any law of the state or federal government designed to protect the health and welfare of the people of Massachusetts is incorporated under the Massachusetts Consumer Protection statute. In such basic areas as health care and housing we have been successful in applying the statute to enforce consumers' rights. For instance, it enabled us to bring the first action against an HMO charged with using deceptive advertising to promote its plan. The HMO stopped its advertising and allowed anyone who joined during the ad campaign to withdraw without penalty and join another health insurance plan. And when we learned that seriously ill people were routinely waiting up to seven hours in a hospital emergency room, we used the Consumer Protection Act to force changes. The statute led to a formal agreement improving communications between the in-patient units and the emergency room and the ambulance service. It was also instrumental in creating a regional network to promptly and effectively handle patient transfers. Significantly, the action marked the first time the statue was used to require a hospital to change its procedures for the benefit of the community it serves.

We were also successful in expanding the protections of the state's Civil Rights law. The obtaining of a preliminary injunction against three employees of a private security firm who were charged with violating the civil rights of two gay men who were patronizing and working in a gay bar in Boston, represented the first time the Attorney General has invoked the state Civil Rights Act in a case involving alleged discrimination on the basis of sexual orientation.

I have selected a handful of accomplishments to highlight in this introduction. Some because they are "firsts" and others because they represent new initiatives. They are, however, a fraction of what the department as a whole has achieved which the following report shows in great detail.

I am encouraged by our early successes and they have convinced me that the public trust we hold affords us the finest opportunities to help our fellow citizens.

## CRIMINAL BUREAU

The Criminal Bureau is comprised of six Divisions: Public Integrity, Narcotics, Special Prosecutions, Victim Compensation, Division of Employment Security, and the Criminal Appellate Division.

During the 1988 fiscal year, the Bureau prosecuted a wide variety of cases developed by its own investigations division, as well as those referred by other government agencies or the district attorneys.

## PUBLIC INTEGRITY

During this first full fiscal year of the Shannon administration, substantial progress was made on the enforcement efforts against crimes of public corruption. Those cases have defined the area of public integrity as a significant priority for Attorney General Shannon.

Division lawyers and investigators devote their time exclusively to public corruption cases. Division cases included: bribery and other violations of the Massachusetts conflict of interest statute (M.G.L. c. 268A); fraud against government agencies in procurement and other matters; election law and campaign finance violations; and related larcenies, tax crimes, and other violations of the public trust by government officials and by those dealing with public agencies.

In addition to five attorneys and a seven-man investigative unit that also works on Special Prosecutions cases, six State Troopers and four Metropolitan Police Officers have been assigned to the Division.

One of the most important tasks of the Division was to establish and maintain working relationships with federal, county and local law enforcement officials, and with other agencies of state government including the State Ethics Commission, Office of Inspector General, State Auditor's Office, Office of Campaign and Political Finance, Criminal Investigations Bureau and the Department of Revenue's Office of Internal Affairs.

Although public corruption cases are complex and take a significant time to investigate and prosecute, several cases were brought by the new unit in fiscal 1988. They include:

*Gerard T. Indelicato*, the former president of Bridgewater State College and Chief Educational Affairs Advisor to Governor Dukakis, was indicted in Suffolk and Plymouth counties on 41 counts of conflict of interest, larceny, fraud and tax violations.

*William Cosgrove*, a 15-year employee of the Department of Revenue, was arrested and charged in a scheme involving the alleged preparation and submission of fraudulent tax returns to obtain refunds.

State *Senator Joseph Walsh* paid an $18,000 civil penalty after admitting that he billed both the State Senate and his campaign fund for travel expenses.

The *City Clerk of Beverly* was convicted after a jury trial of tax violations for his failure to report income he earned from fees collected by his office and as municipal census supervisor. He was acquitted of larceny charges.

A contractor and a supplier were indicted for the alleged submission of fraudulent invoices to the Metropolitan District Commission in connection with the supply and servicing of traffic signal equipment. The case was developed in cooperation with the Office of the Inspector General (IG).

In another IG case, convictions were obtained against three businessmen, two MDC engineers, and a contractor for a padded billing scheme involving the supply and servicing of MDC sound amplification equipment. Four of the defendants received jail sentences.

A former deputy sheriff of Middlesex County was indicted for larceny and tax crimes allegedly committed in his official capacity.

The Division also participated in the investigation and prosecution of several cases of theft, embezzlement, and tax violations by public employees involving abuse of public office.

A significant number of investigations are continuing.

## NARCOTICS

Fiscal 1988 was the first fully operational year for the Narcotics Division. Totals from Narcotics Division investigations and prosecutions include:

32 Cases
63 Defendants
48 Cocaine Traffickers Charged
12,354.78 grams of cocaine seized (approximately 27 pounds)
$98,053 cash seized (In addition to approximately $100,000 seized in a federal case, which may be subject to forfeiture under federal law)
9 vehicles seized; two forfeited
More than 25 guns, rifles, and other firearms including shotguns and a bullet-proof vest.

In addition, members of the state police unit assigned to the division have assisted the Chelsea police department in a series of street cocaine purchases from nine individuals. Three were prosecuted by the Division and their cases were resolved in the Chelsea District Court. Each received a jail sentence.

One case referred to this office for prosecution by the Drug Enforcement Administration (DEA) involved a DEA special agent who made three ounce quantity purchases (164 grams total) from Konstantinos Koulouris. The case was prosecuted by Division attorneys in Middlesex Superior Court. Koulouris was convicted on all counts and was sentenced to two separate three-year minimum-mandatory terms to be served concurrently. In addition, his two-family house in Arlington is the subject of a federal forfeiture action.

In another instance, the state police assigned to the Division initiated a counterfeiting investigation which, with the assistance of the U.S. Secret Service, resulted in the seizure of approximately $3 million in counterfeit, in various states of completion. The Secret Service describes this seizure as the largest in Massachusetts in 10 years.

Other seizures by the Division involved marijuana, heroin, and LSD.

The Narcotics Division has also participated in drafting and lobbying a number of legislative proposals, including the state RICO bill, the narcotics proceeds forfeiture bill, the pen register bill, the precursor chemical bill, and the immunity bill.

## SPECIAL PROSECUTIONS

The Special Prosecutions Division investigated and prosecuted environmental, tax and major fraud cases. In addition, the Division functioned as the headquarters for general criminal investigation and prosecution within the Attorney General's office, typically in violent crime or general criminal cases referred to this office by District Attorneys because of possible conflict of interest.

Thirty-five criminal tax cases were litigated during the fiscal year. Twenty-one new cases were indicted. Seventeen cases were disposed of, 15 of those with convictions. The criminal tax cases involved a full range of crimes including income tax evasion and failure to file, sales tax frauds, failure to pay over collected sales and meals taxes, and other violations.

The Division succeeded in substantially increasing criminal fines levied and collected in tax cases—a reflection of recent changes in state laws which allowed increasing criminal penalties for tax crimes.

The Division litigated four significant environmental cases during the fiscal year with more under investigation by the six-member Environmental Police Unit assigned to the Criminal Bureau by the state's Division of Fisheries, Wildlife and Environmental Law Enforcement. Of the four cases prosecuted, two were successfully disposed of with convictions and fines, and two remain in litigation at year-end. All four cases involved the illegal disposal of hazardous waste, with related transportation and reporting violations.

The major fraud cases prosecuted during the fiscal year follow:

—Two cases were brought against Boston attorneys for embezzling of client funds.

—Two insurance agents were charged with collecting insurance premiums from customers and illegally converting them to personal use rather than paying them over to the insurance carriers.

—Six former staff members of Boston University Medical Center were charged in a commercial bribery scheme. The defendants allegedly padded invoices from suppliers and skimmed parking lot receipts at the University. Two defendants pleaded guilty; the other four cases are pending.

Several criminal cases were referred to this office by District Attorneys and were prosecuted by Division attorneys. These cases ranged from homicide to assault and battery to motor vehicle violations. Others remain under investigation. Several involve police officers as defendants or subjects of investigation.

Several public employee embezzlement and theft cases were prosecuted. The Criminal Bureau receives a steady stream of referrals for this type of conduct, and prosecutes those where the evidence warrants criminal charges.

The Division successfully prosecuted a case involving fraudulent auto theft claims, also known as operation "Go Fast." During the previous fiscal year, a joint state-federal undercover investigation brought 111 indictments against these individuals as well. The defendants were charged with concealing a motor vehicle to defraud an insurer, filing false police reports, and related charges involving automobiles which had been falsely reported as stolen by their owners.

Working in conjunction with the Governor's Auto Theft Strike Force, the Criminal Bureau oversaw a 12-month undercover investigation in which more than 100 automobiles were "given up" by their owners, usually through middlemen, and then falsely reported as stolen to collect insurance proceeds. Of the 54 individuals charged, all were convicted with the exception of five cases which remained pending at year-end and two which were dismissed.

Criminal enforcement against insurance fraud remains a high priority of Attorney General Shannon as one important way to attack the problem of high insurance premiums in the Commonwealth.

Other cases prosecuted or investigated by the Division during fiscal 1988 included welfare fraud, computer theft, criminal contempt of court, consumer fraud, arson, civil rights, and frauds against public agencies and private employers.

## EMPLOYMENT SECURITY

The Employment Security Division in the Criminal Bureau provides the Division of Employment Security (DES) with the legal assistance and representation necessary to enforce the Massachusetts employment security laws. The Division also handles appellate matters arising from decisions granting or denying unemployment compensation benefits to individual claimants.

The Division prosecutes employers who fail to comply with the Employment Security Law by not filing the necessary reports required by law or paying the taxes owed by law to the Division of Employment Security.

The Division makes every effort to fully imform employers of their rights and obligations under the law. As a result, some intransigent taxpayers, when faced with the prospect of criminal prosecution, decide to pay their taxes.

During the fiscal year, *1167 employer tax cases* were handled by the division. When the year began, *1087* cases were pending, and *80* additional cases were received. At the close of the fiscal year, *15* cases were closed, leaving a balance of 1152 employer tax cases pending.

Applications for criminal complaints were brought in the Boston Municipal Court, charging *69* individuals with *640* counts of nonpayment of taxes, totaling *$1,403,129.86* owed to the Commonwealth by delinquent employers. The Boston Municipal Court issued complaints against *85* individuals for *787* counts of nonpayment of taxes totaling *$1,752,374.80.* In addition, the Division obtained eight convictions on employer tax cases and the court found facts sufficient to warrant a finding of guilty in another *40* cases.

Overdue taxes totaling *$1,154,086.34* were collected during the fiscal year, and deposited in the Massachusetts Unemployment Compensation Fund.

The Division successfully prosecuted a single individual who owed more than $800,000 in employment security taxes. He was sentenced to serve a year in jail with a two-year suspended sentence.

The Division also prosecutes individuals who collect unemployment benefits while gainfully employed and earning wages. Criminal complaints are brought only when the facts surrounding the offense have been investigated and criminal intent substantiated. Complaints are filed in the jurisdiction where the claimant applied for benefits.

During the fiscal year, *675* fraudulent claims for unemployment benefits were handled by the division. When the year began, *645* cases were pending and *30* more cases were filed. At the end of the year, *63* cases were closed, leaving a balance of *612* employer tax cases pending.

Applications for criminal complaints were brought in the various courts of the Commonwealth, charging *39* individuals with *714* counts of larceny totaling *$109,345.99* in unemployment insurance benefits fraudulently collected from the Commonwealth. The courts issued complaints against *33* individuals for *636* counts of larceny totaling *$96,367.34.* In addition, the Division obtained *six* convictions on larceny cases and the court found facts sufficient to warrant a finding of guilty in an additional *13* cases.

Restitution totaling *$134,079.97* was collected from fraudulent claimants during the fiscal year and many have been restored to the Massachusetts Unemployment Compensation Fund.

The Division also represents the Director of DES—both in cases brought against him and also on his behalf. During the Fiscal Year, the Division represented the DES Director in *28* cases. Of those cases, *27* were on hand at the beginning of fiscal 1988, and *one* additional case was filed.

The Division also handled seven appellate cases arising from decisions granting or denying unemployment compensation benefits to individual claimants in the Supreme Judicial Court or the Appeals Court of the Commonwealth. Six cases were pending when the year began and one was filed. Five of the cases were argued and closed. Of those, the court upheld the position of the Director's attorney in two cases, denied the position in two cases, and the U.S. Court of Appeals affirmed

a Motion to Dismiss in one case.

During fiscal 1988, the Division's case records were computerized, which will allow easier identification of repeat offenders.

## VICTIM COMPENSATION

After a reorganization of the Criminal Bureau, a separate Victim Compensation Division under Attorney General Shannon was established in July 1987.

The Massachusetts Victim of Violent Crime Compensation Act, enacted in July 1968, was one of the first programs of its kind in the nation. The Victim Compensation Program is funded through general revenue. The division is also funded by a $112,000 grant from the state's Victim and Witness Assistance Board, and by a $353,000 federal grant from the U.S. Department of Justice.

Under the provisions of M.G.L. Ch 258A, claimants are eligible to receive up to $25,000 for out-of-pocket expenses. Claimants may be reimbursed for medical care and mental health treatment, as well as for lost earnings. There is no compensation for loss of property or pain and suffering.

Claims are filed in the District Court where the claimant lives and are investigated by the Department of the Attorney General.

The Victim Compensation Division addresses various concerns confronted by victims of violent crimes. Among other duties, this Division:

— Expedites and verifies claims for compensation filed under the State's Victims of Violent Crime Compensation Act (M.G.L. Ch 258A);

— Performs community outreach to create awareness of the protections and rights provided by the state's Victims of Violent Crime Compensation Act and the Victim's Bill of Rights (M.G.L. Ch 258B); and

Provides direct services to victims and witnesses involved in cases prosecuted by the Attorney General's Criminal Bureau and Civil Rights Division.

Previously, when claims were handled in the Civil Bureau, the average processing time for each claim exceeded a year. Since the Victim Compensation Division was created, the average prcessing time has been reduced to seven months. The goal of the unit is to process claims in 120 days.

The Victim Compensation Division's accomplishments go beyond the more expeditious processing of claims. Over the past year, staff advocates have demonstrated a substantial effort at guiding victims through the complex network of social services available in Massachusetts. They have assisted complainants to secure temporary emergency housing; directed victims to several charitable institutions which have emergency funds; and they devoted the bulk of their time to securing free medical care and welfare benefits for victims whose lives are suddenly and violently disrupted.

During fiscal 1988, the office developed a new brochure and poster designed to explain the compensation program. This brochure is available in Spanish and English. Payments to victims from the Victim Compensation Fund in FY 1988 totaled $2,647,018.25, representing 462 claims.

### CRIMINAL APPELLATE

The Criminal Appellate Division handles appeals from cases prosecuted by the Criminal Bureau and represents the Commonwealth in criminal matters in federal court (including the United States Supreme Court). The division also handles a wide range of post-conviction litigation including federal habeas corpus actions challenging state convictions; civil rights suits brought by incarcerated persons, petitions for annual review of inmates confined as sexually dangerous persons at the Treatment Center at Bridgewater; and supervisory powers litigation in the Supreme Judicial Court.

The Division provides formal opinions to the governor in the rendition of fugitives from justice, files amicus curiae briefs in significant appellate cases, and contributes to policy and legislative matters concerning law enforcement.

The Division filed a petition of certiorari in the United Statte Supreme Court, seeking review of the SJC's decision in *Commonwealth v. Morash.* In this case, the Supreme Judicial Court ruled that prosecution of employers for failure to pay employees for unused vacation time was preempted by the federal "ERISA" statute.

Division attorneys were actively involved in drafting the brief in *Commonwealth v. Oakes,* in which the Supreme Court agreed to review the SJC's decision striking down the state's child pornography statute.

The Division successfully opposed four petitions for certiorari seeking review of decisions favorable to the Commonwealth.

Attorneys in this Division successfully argued a number of cases in the First Circuit Court of Appeals. In 13 cases briefed and argued during fiscal 1988, the Division secured decisions in federal habeas corpus and civil rights cases that were favorable to the law enforcement interests of the Bureau. Similarly, 10 cases in the SJC and 11 cases in the Appeals Court were ruled in the Division's favor in decisions reviewing criminal convictions and prisoner suits.

Division attorneys handled 16 contested hearings involving discharge petitions filed by sexually dangerous persons; six state habeas corpus trials filed by fugitives challenging rendition proceedings; and obtained two favorable federal court jury verdicts in civil rights cases. The Division also rendered 290 opinions on the legality of rendition demands.

## MEDICAID FRAUD CONTROL UNIT

During Fiscal Year 1988, the certified Medicaid Fraud Control Unit (MFCU) was in the forefront of the growing national focus on health care provider fraud and the need to protect elderly nursing home residents from physical and financial abuse.

MFCU prosecutes both institutional health care providers and ambulatory providers such as doctors, dentists, psychiatrists, laboratories, pharmacies and transportation companies. The unit also has successfully prosecuted instances of physical abuse to patients in long-term care facilities.

MFCU opened 74 cases in FY 1988. During the year, the unit initiated 13 prosecutions and obtained 17 convictions. As a result of these convictions, defendants paid $101,250 in fines, $258,500 in restitution, and $176,510 in costs and damages. An additional $103,023 in overpayments and $30,080 in patient funds also were recovered. Most MFCU prosecutions were initiated through a special grand jury specifically impaneled to investigate allegations of Medicaid fraud.

During fiscal 1988, MFCU continued its investigation of dental service providers. One noteworthy case illustrates the unit's increasing sophistication in using computerized data processing, which has led to a dramatic increase in the efficiency of investigations.

In this case, a dentist was identified by the Department of Public Welfare's Surveillance Utilization Review Subsystem (SURS) of the Medicaid Management Information Systems (MMIS). This computerized system helps identify fraudulent billing patterns of dental providers by comparing them to normal billing patterns. The system found that 99 percent of this dentist's bills filed to the Medicaid program were for three surface fillings. Without the computerized system, the fraudulent billings would have gone undiscovered.

Using this same system, an analysis revealed that virtually all of the dentist's bills were either for three surface fillings or repairing broken front teeth. The computer generated a list of patients who were then examined by two dental consultants and the MFCU's staff dental hygenist. A photographic record was made of each recipient's mouth, and all recipients were interviewed.

The investigation concluded that nearly 68 percent of the billings were fraudulent. The provider admitted criminal liability and pled guilty to one count of Medicaid False Claims and a fine of $10,000, paying $30,000 in restitution, costs and damages. The conviction permanently bars this dentist from participating in the Massachusetts Medicaid program.

During fiscal 1988, a lengthy investigation by the MFCU audit staff of a nursing home owner unearthed a scheme involving two accomplices who stole high-priced prescription drugs from Massachusetts General Hospital. The two, in turn, gave the drugs to another individual who resold them to a number of pharmacies throughout the state. The courier who distributed the stolen drugs was placed on the payroll of several nursing homes as a "no-show" employee. The investigation also led to charges that other "no-shows", including the nursing home owner's wife, were being carried on the payroll.

Indictments in the case were returned in September, 1986 against the owner, a co-owner who worked as the comptroller, a pharmacist formerly employed by the hospital, and five nursing homes corporations. The charges ranged from violations of the state's Medicaid False Claims Act to conspiracy to steal pharmaceuticals.

In April 1988, the owner pled guilty to a charge of receiving stolen property, and received a suspended sentence of three to five years. He was ordered to pay $25,000 in restitution to the hospital and $15,000 for investigation costs to the Welfare Department. In a separate civil agreement, he also agreed to repay $26,700 to the Welfare Department for carrying his wife and an employee of his pharmacy on the nursing home payroll. In addition, two corporate defendants pled guilty to charges that "no-shows" were fraudulently included in the nursing homes' cost reports. The corporations, which are in bankruptcy, were each ordered to pay a fine of $2,500.

MFCU also successfully prosecuted a taxicab company which pled guilty to extensive billing fraud when providing transportation to Medicaid recipients.

The investigation of the case referred to MFCU by the Welfare Department found that the Medicaid program was billed between two and six times more than the fare allowable under Medicaid billing regulations. The 45 trips examined by MFCU were billed by the company hundreds of times. The overpayments totaled $77,000. The overcharges covered some 50,000 miles, or the equivalent of two trips around the world by taxicab.

The corporation's owner pled guilty to larceny and violating the state's Medicaid False Claims Act and received a six-month sentence, of which three months were served. The owner's wife, who handled company billing, pled guilty to charges of Medicaid fraud and larceny and was fined $12,500. The corporation pled guilty to like charges and was fined $12,500. In addition, restitution of $77,000 was imposed on all defendants jointly and severally. The payments called for under the plea agreements totalled $102,000.

During fiscal 1988, the MFCU concluded two significant cases involving mental health providers. The first involved a mental health clinic where there were allegations that clinic employees were billing for one-hour sessions, when therapists were spending thirty minutes or less with Medicaid patients. These charges were later confirmed by an investigation and a special grand jury.

The grand jury returned indictments against the clinic and four of its employees. The clinic pled guilty to charges of submitting false Medicaid claims. One of the four employees received a six-month suspended sentence in the House of Correction, and the other three received probationary terms. Fines and restitution were also ordered. Two other therapists entered into civil agreements. The resolution of the case led to restitution of $120,000, costs of investigation and damages of $60,000, fines of $32,500, and civil recoveries of $12,000.

The second investigation involved a professional corporation which delivered psychiatric services to Medicaid recipients. The provider also upgraded services by billing for more time than was actually spent with the patients. Additionally, the corporation billed for services by psychiatrists when they were actually rendered by staff therapists. These fraudulent claims were primarily for in-patient psychiatric services.

The provider pled guilty to larceny from the Medicaid program and paid restitution, costs and fines totaling $92,500. The individual doctors associated with the professional corporation were indicted on charges of filing Medicaid false claims and placed under the care of the probation department.

The Medicaid Fraud Control Unit had a number of cases under investigation at the close of the fiscal year.

## PUBLIC PROTECTION BUREAU

The Public Protection Bureau (PPB) consists of 11 divisions: complaints, local consumer programs, consumer protection, anti-trust, civil rights, environmental protection, insurance, public charities, utilities, nuclear safety, and special litigation.

The Bureau brings affirmative litigation on behalf of the public and represents the public in insurance and utility rate hearings. The Bureau also represents state agencies and boards that are involved in the public interest.

### CONSUMER COMPLAINTS

During Fiscal Year 1988, the Complaint Section opened 3,763 consumer complaint cases, closed 2,323 cases, and assigned 2,458 cases to Complaint Section personnel.

The section recovered $725,654.83 in refunds, savings and the value of goods or services for consumers—a reimbursement that would not have been possible without the intervention of the department.

In addition, 5,889 complaints were processed by the section: 1,202 were returned to consumers for lack of jurisdiction; 761 were referred to other state or local agencies; 733 were referred to other agencies in other states; and 3,193 were referred to local consumer programs.

The Information Line staff received 102,022 phone calls during fiscal year 1988. As a result of these calls, 6,819 citizens were sent Complaint/Inquiry Forms; 16,449 were given general information; and 78,823 were referred to local consumer programs or other state or federal agencies.

The staff also received 181 calls concerning civil rights issues. As a result of these calls, 116 citizens were sent Complaint/Inquiry forms, and 66 were given information relating to civil rights inquiries.

Additionally, consumer complaints filed against businesses were reviewed because of repeat allegations of unfair or deceptive practices which led to dozens of referrals to the Consumer Protection Division for further investigation and possible litigation.

## LOCAL CONSUMER PROGRAMS

The Local Consumer Service Unit is responsible for the administration of the Local Consumer Aid Fund and awards grants to a network of local consumer and face-to-face mediation programs. These community agencies assist citizens throughout the Commonwealth in the resolution of consumer problems. The local programs work in cooperation with the Department of the Attorney General and help identify repeat offenders of consumer laws.

Funding for the operation of these programs is allocated by the General Court to the Local Consumer Aid Fund (LCAF) (M.G.L. c. 12, s. 11G).

In FY 1988, a total of $781,007 was used for grants to 27 local consumer programs and eight face-to-face mediation programs. During fiscal 1988, $730,551 was appropriated by the Legislature to the Local Consumer Aid Fund. Ten percent, or $73,055, was retained for administrative purposes. An additional $121,500, earmarked for the LCAF in the settlement of consumer related cases, was used to supplement the Legislature's allocation. Education grants to seven Local Consumer Programs were funded by $19,500 from the settlement account.

In FY 1988 there were *27 Local Consumer Programs* working in cooperation with the Attorney General's office. These local programs, usually part of community action programs or city halls, handled 16,823 consumer complaints. Through an informal process of telephone mediation, the community agencies saved consumers approximately $3.2 million.

Complaints typically involved automobile repairs and sales, home improvement transactions, landlord/tenant disputes and time-share issues. In addition to mediation services, the programs serve as a valuable source for general consumer information and advice.

In FY '88, there were seven fulltime *Face-to-Face Mediation Programs*, each operating with one paid staff person and 20 to 25 trained community volunteer mediators. Mediations involved landlord/tenant or consumer disputes. Referrals came from local consumer programs, small claims courts, landlord or tenant advocacy programs, and other community agencies.

The Face-to-Face Mediation Program provided mediation services by assigning 250 trained citizen volunteers. A total of 557 face-to-face mediation sessions were held—85 percent resulted in written agreements, with 96 percent of those agreements upheld. In addition, 271 cases were resolved over the telephone by face-to-face staff.

## CONSUMER PROTECTION

The Consumer Protection Division brings enforcement actions against businesses which use unfair and deceptive practices resulting in injury to consumers. Concentrating on cases where consumers cannot reasonably obtain relief through their own efforts, the Division's caseload consists primarily of large-scale class actions brought on behalf of consumers affected in similar ways by the illegal activities of business. The Division's caseload generally addresses housing, health care, financial services, and automobiles.

In *Commonwealth v. Loiselle, et al.* a final judgement was entered by consent in this condominium conversion case. The owners of a 48-unit apartment complex in Dracut agreed to comply with the condominium conversion law and provide restitution for tenants harmed by their failure to give timely notice of their intent to convert the property to a condominium.

As part of the agreement, the owners have now sent written notice of all of the protections of the law to their present tenants and to the former tenants who moved out after the defendants purchased the property on March 31. In addition to giving the tenants all the protections required by law, the owners also agreed to a number of terms to compensate tenants for losses suffered because of the owners' initial failure to comply with the law.

The defendants agreed to pay the Commonwealth a civil penalty of $5,000 under the Consumer Protection Act and pay up to $24,000 more if at least eight present or former tenants do not buy their apartments at the reduced price.

A preliminary injunction was issued in *Commonwealth v. Douglas Nason* against Douglas Nason for repeated violations of the Massachusetts Lead Paint Law and hundreds of violations of the State Sanitary Code in at least three Attleboro apartment buildings. Despite repeated orders by the Childhood Lead Prevention Program dating back to 1982 and the Attleboro Health Department, the defendant failed to bring his 16 apartments into compliance.

The injunction orders the defendant to remove or adequately cover lead paint or other such material contained in the property which houses sixteen Cambodian families and more than 30 children; to comply with outstanding orders issued by the Attleboro Health Department and Childhood Lead Prevention Program; and to provide a representative of each rental unit with a written notice to disregard recent rent increases issued by the defendant.

The Attorney General filed suit in Suffolk Superior Court to prevent the closing of Chelmsford Mobile Home Park and eviction of 600 residents in *Commonwealth v. Chelmsford Trailer Park, Inc.* The park residents own their own mobile homes but rent the lots on which the homes are installed. The park land is owned by Chelmsford Trailer Park, Inc. whose principals are James DeCotis of Saugus and Carl DeCotis of Salem.

The complaint alleges that the owners sent the closing notice in retaliation for the residents' success in obtaining rent control. The notice was sent three months after the owners lost a legal battle over rent control with the residents, the Town of Chelmsford and the Attorney General. The complaint also alleges that the closing notice was intended to frighten residents into voluntarily giving up their rent control rights.

If the homeowners are forced to move because of the announced closing, they stand to lose more than 60 percent on the resale value of each home. The total loss to homeowners, some of whom are elderly and living on fixed or low to moderate

incomes, and many of whom have devoted their life savings to the purchase of their homes, would exceed $4.9 million. Under a stipulation the defendants agree to take no action to close the park or evict any tenants until all legal proceedings, including appeals, have been completed.

In *Commonwealth v. Worcester City Hospital*, an Assurance of Discontinuance was filed after the hospital agreed to stop posting the names of individuals who tested positively for the antibodies to the AIDS virus in its laboratories. This agreement was the first enforcement of c111, §70F which guarantees the right to confidentiality of persons tested for antibodies to the HIV virus.

Assurances of Discontinuance were filed against Malden Hospital and Central Hospital for the denial of care to General Relief recipients. *(Commonwealth v. Malden Hospital and Commonwealth v. Central Hospital)*

The two cases were based on a 1984 amendment to the state's hospital cost containment law which required all hospitals to provide medically necessary care to General Relief recipients. The law was intended to create an entitlement to care for General Relief recipients. In both cases, the hospital had turned away General Relief recipients who were seeking either alcohol detoxification or in-patient psychiatric services.

In the *Matter of South Shore Hospital, Inc.*, an Assurance of Discontinuance relating to hospital emergency room ("ER") procedures was executed by the president of South Shore Hospital and filed in Suffolk Superior Court on November 9, 1987. This Assurance, obtained pursuant to c.93A, §5, is the first to impose specific obligations on a hospital administration inpatient care.

South Shore Hospital's ER is the third largest in the state; it receives and cares for about 45,000 patients each year. However, an investigation conducted by the Department of Public Health (DPH) revealed many serious deficiencies in the way patients have been treated. These included the hospital's practice of permitting acutely ill patients to remain in the ER for inordinately long periods of time (up to 13 hours) after diagnosis before either admitting them or transferring them to another facility; and the hospital's failure to regulate the flow of patients through its ER when the availability of in-patient beds was limited. Accordingly, the Assurance establishes procedures to eliminate the deficiencies, helps regulate patient "traffic" to and through the hospital's ER, and ensures the delivery of appropriate patient care as promptly and efficiently as possible.

In *Commonwealth v. Health Enterprises of Massachusetts, Inc. d/b/a Jamaica Towers Nursing Home*, suit was filed against the operator of the Jamaica Towers Nursing Home. The complaint alleged serious patient neglect and violation of several state and federal regulations governing the delivery of health care in nursing homes. At the same time, a Stipulation in Lieu of Injunction was executed and filed under which the provider, H.E.A. of Massachusetts, Inc. ("H.E.A."), agreed to transfer complete management and control of the nursing home to a new, unrelated administration.

The complaint describes serious substandard conditions which DPH investigators uncovered throughout the 120-bed facility. It specifically alleges that neglect contributed to the death of a 94-year-old patient from a urinary infection. At approximately the same time, and as a result of DPH recommendations, HCFA decertified Jamaica Towers from both the Medicare and Medicaid programs. That action stopped the flow of federal funds to the facility.

In the Stipulation, H.E.A. agreed to a two-stage withdrawal from control of the home. During the first stage, it has been financing the rehabilitation of the home,

investing an initial $100,000 for an independent expert to remedy deficiencies. The second stage, which will begin if and when the home is recertified for Medicare/Medicaid funding, involves finding a DPH-approved operator to assume permanent control of the facility.

A Complaint and Petition for Appointment of a Receiver was filed against *Beverly Enterprises-Massachusetts, Inc. d/b/a Greycliffs on Cape Ann Nursing Home ("Greycliffs").* The Complaint/Petition alleged that Beverly Enterprises, one of the nation's largest nursing home chains and owner/operator of Greycliffs, neglected patients living in the 101-bed facility so grievously that the patients were put at risk of death or serious physical injury. Conditions became so bad that DPH terminated the facility's Medicaid certification on December 15, 1987.

At the eleventh hour, just prior to our asking the Court for the establishment of a receivership pursuant to M.G.L. c.111, §72N, Beverly stepped forward. The company agreed to give up control of Greycliffs immediately, to install and pay for a so-called "functional receiver" to operate the facility, and to sell the nursing home to a suitable buyer approved by the state. The sale would follow a full rehabilitation of Greycliffs and Beverly also agreed to pay the the expenses of the long-term care expert chosen by the Commonwealth to act as the "functional receiver". These terms were formalized in a Stipulation in Lieu of Order Appointing Receiver which was filed in Suffolk Superior Court on December 16, 1987, together with the Commonwealth's Complaint/Petition.

In the matter of *Attorney General and Department of Public Health v. H.E.A. of Massachusetts, Inc. d/b/a Anlaw Nursing Home, Peter Kern and Marie Bergeron* the Division obtained the appointment of a patient-protector receiver to take over the operation and control of the Anlaw Nursing Home in Lawrence. At the same time, a c.93A action was filed against the defendants charging them with violating state/federal regulations governing the delivery of health care, and with numerous instances of repeated patient neglect.

Litigation was speedily initiated following reports from DPH that the already substandard conditions were seriously deteriorating. The home was functioning without either an Administrator or Director of Nurses. Many of the patients were not being properly fed and were left lying in their own feces and urine.

*Attorney General et al. v. Grover Manor Chronic Hospital et al.* resulted in the largest financial settlement recovered in any case involving patient neglect. The defendants agreed to pay the Commonwealth $550,000 to settle the receivership and consumer protection actions brought against them. A final consent judgment was entered on February 5, 1988, and approved by Superior Court Justice John Irwin, Jr.

In *Commonwealth v. Healthway Medical Plan, Inc.*, a consent judgment was entered in Suffolk Superior Court in the first consumer protection action brought by this office against a health maintenance organization ("HMO"). The complaint filed with the judgment alleged that Healthway Medical Plan, Inc. ("Healthway"), a South Shore HMO, committed unfair and deceptive acts while promoting its health plan at employer-sponsored health fairs. Specifically, it alleged that Healthway printed and distributed a so-called consumer comparison guide which purported to compare the services of four competing HMOs (including Healthway's). The guide indicated that Healthway provided all the services listed on its chart while falsely suggesting that its competitors did not offer the same or similar coverage.

The judgment, approved by Judge Andrew Gill Meyer, permanently enjoins Healthway from further creating or disseminating any form of sales presentation

or promotional materials which mislead consumers. In addition, Healthway agreed to permit those consumers who thought they had been misled by the guide to withdraw from Healthway's plan without penalty and to help their transfer to another health plan. Finally, Healthway paid the Commonwealth $2,500 in civil penalties and $2,000 for costs and attorneys fees.

Legan action was taken against a number of drug stores for selling expired infant formula: *Commonwealth v. Osco Drug, Inc.; Commonwealth v. Heartland Drug; Commonwealth v. Walgreen Co.;* and *Commonwealth v. Rite-Aid Inc.* Complaints were filed in Suffolk Superior Court under the Consumer Protection Act against all four companies. Our investigation found retail stores selling or offering for sale infant formula after the "use-by" date marked on the product. Experts indicate that such products may be nutritionally deficient, have rancid or poor flavor, and be potentially harmful to children.

On November 25, 1987, a preliminary injunction hearing was held requesting the defendants be enjoined from selling or offering for sale infant formula once the "use-by" date expires. Injunctions were issued against Ocso Drug, Inc., Heartland Drug, and Walgreen Co. In the case of Rite-Aid, Inc., a Stipulation in Lieu of Injunction was entered because the company agreed to abide by the expiration dates on the products.

In *Commonwealth v. Champney*, a settlement providing a permanent injunction was entered stopping adoption activities by this Plymouth woman until she is licensed. It also barred misrepresentations about the health and availability of children for adoption should she secure a license. Champney was required to pay $20,000 to six couples and other individuals who had attempted to adopt children through Champney without success or whose adoptive children required extensive medical care. Champney facilitated the adoption of more than 300 children between the mid-1970s and the 1984 entry of the preliminary injunction. Many couples reported a number of practices including misrepresenting the date of arrival and health of the adopted children.

The judgment also requires that $10,000 be held in a trust account for six months to pay potential future claims against Champney, and for the payment of $11,700 to the Commonwealth as part of a penalty and for costs.

A trial was held in *Commonwealth v. Montgomery* for violations of a prior preliminary injunction. The earlier preliminary injunction had enjoined defendants from providing unlicensed day care in Roxbury. At trial, it was determined that defendants continued to provide day care at the Blue Hill Revival Center in Dorchester despite the earlier injunction. Following the trial, the defendants were found in contempt and ordered to pay a $20,000 fine.

In *Commonwealth v. Freedlander, Inc. The Mortgage People*, a final judgment was obtained for charging excessive interest on second mortgages of $1,500 or more on real estate with an assessed value of less than $40,000. The judgment permanently enjoins the defendant from charging interest in excess of the statutory limit and required the defendant to pay approximately $37,400 in restitution to injured consumers, and a $5,000 civil penalty to the Commonwealth.

*In the Matter of Commonwealth Mortgage Company, Inc.*, this Assurance represents the last of the cases initiated in 1986 after consumers complained that lenders were not honoring commitments on locked-in mortgage interest rates.

Under the terms of the Assurance of Discontinuance, Commonwealth Mortgage Company agreed to honor locked-in mortgage rates for 23 consumers who did not receive the promised rate even though they were not at fault in delaying the loan

closing. Commonwealth agreed to either rewrite the loan or make up the difference between the original locked-in rate and the closing rate for the life of the loan, with Commonwealth making an annual refund of interest payments. Commonwealth further agreed to provide full disclosure, both orally and in writing, at the time of application, which outlines the reasons and circumstances for which a mortgage loan may not close within a locked-in period.

*In Re: Malmart Mortgage Company*, as a result of intervention in this major mortgage company bankruptcy, a court order was secured requiring the trustee to segregate tax and insurance premium payments made to the company by mortgagors. A number of specific problems have arisen as Malmart transfers its mortgages to other servicing companies as part of its liquidation. Additional legal theories are being developed to protect consumers in the event Malmart cannot maintain its obligations.

*Commonwealth v. William Wolff* resulted in a preliminary injunction in Norfolk Superior Court barring Wolff from further operating his loan brokerage business. Wolff was a Quncy loan broker who promised to obtain mortgage loans for many consumers but never procured the loans. The preliminary injunction also prohibits Wolff from destroying, concealing and transferring any records of his business activities and from conducting any other business in the Commonwealth without prior written notice to the Attorney General. The injunction incorporates the terms of a temporary restraining order obtained on Feb. 5, when the Court granted our request for a $30,000 attachment on Wolff's bank accounts.

On Feb. 4, Wolff was arrested on 14 counts of larceny by false pretenses brought by the Criminal Bureau stemming from his loan brokering activities, and held on $25,000 bail. On Feb. 10, he was indicted on 22 additional counts of larceny by false pretenses stemming from the same activities.

In *Commonwealth v. National Credit Services, Inc.*, a final judgment was entered in Suffolk Superior Court against National Credit Services, a Los Angeles based debt collection business that was operating in Massachusetts. The collection business had attempted to collect payments from Massachusetts residents by threatening people with claims they could be arrested or that their wages could be attached. The suit was filed under Chapter 93, which governs the activity of debt collection agencies.

Under the terms of the judgment, National Credit Services is prohibited from any debt collection activities in Massachusetts until it meets all the licensure requirements of the Commission on Banks and Banking.

On Dec. 1, 1987, a temporary restraining order (TRO) was granted in *Shannon v. Sally Campbell, Donna Asaili, et al.*: to prevent promoters of a pyramid scheme from participating in or recruiting for the scam. The TRO coincided with criminal arrests made by state troopers assigned to the Criminal Bureau. A civil complaint naming 33 individuals as well as John Does 1-100 and Jane Does 1-100 was filed on Nov. 30, 1987 alleged violations of the "pyramid" statutes, G.L. c.271, §§6A and 7 and G.L. c.93A, §2 for promoting the "Airplane Game," a pyramid scheme designed to provide a $12,000 return on a $1,500 investment.

At the preliminary injunction hearing on Dec. 10, 1987, the court approved Stipulations In Lieu of Injunction and granted the injunction for the 33 named defendants as well as seven others served under the John and Jane Does.

This effort has seriously hindered the pyramid scheme which had caused hundreds of consumers throughout the state to lose thousands of dollars.

A complaint and consent judgment were entered against *Time Out Properties, Inc.* and other defendants for the operation of the time-share development *Mariner's Point Beach Club* of Falmouth. The lawsuit alleged that the owners and managers of Mariner's Point had engaged in unfair and deceptive practices in the sale of time-share units in violation of the state's consumer protection laws.

As a result of an investigation into ticket selling practices, the *Boston Red Sox Baseball Club* agreed to enter into an Assurance of Discontinuance. Under the terms of the Assurance, the Red Sox agreed to refrain from imposing a surcharge on credit card transactions. In lieu of restitution to consumers, the Red Sox agreed to distribute 3,380 tickets to local recreation departments for games during July and August of the 1988 season.

After an eight day trial, in *Commonwealth v. Wellesley Toyota Company, Inc. et al.*, the jury found that of the 10 consumer witnesses presented by the Commonwealth, all had been compelled to buy unwanted features such as rustproofing, soundproofing and pinstriping in purchasing the automobile of their choice. Responding to special questions framed by the court, the jury also listed the specific items consumers were required to purchase. Furthermore, in response to a third special question, the jury found that five of the consumers had been misled by the defendants' failure to disclose material facts about the options, including the location where they were installed.

The Commonwealth sued *Dedham Nissan, Inc.* for failing to have certain stickers posted on automobiles offered for sale as required by state and federal law.

Federal law requires that all new cars and station wagons have the so-called "Monroney" sticker applied to the side window of new vehicles to inform customers of the Manufacturer's Suggested Retail Price including factory installed options and freight. The Federal Trade Commission requires all used cars offered for sale by a dealer to have the "Used Car Buyer's Guide" affixed which informs customers of the warranty protection, including implied warranties, that accompany the sale of the vehicle. Massachusetts requires all new vehicles to also have affixed the notice of New Car Lemon Law rights required by G.L. c.90, §7N 1/2. The dealer is enjoined from future violations and paid $9,000 in civil penalties.

During fiscal 1988, the Consumer Protection Division obtained dozens of consent judgments, assurances of discontinuance, and letter agreements from *automobile dealerships* and individual officers. The Division's program of monitoring and enforcement is continuing.

The Consumer Protection Division has continued its enforcement of *unfair and deceptive advertising practices* by monitoring retailers' compliance with the Attorney General's retail advertising regulations. The Division has obtained many assurances of discontinuance and letter agreements over the past few years, including a number over the past few months, for violations relating to the retailers' use of manufacturer's suggested retail price comparisons, and the range of price advertisements in which the retailer fails to identify the basis of its savings claims.

Our office has been actively organizing the offices of other attorneys general across the country to address the critical *safety hazards posed by all-terrain vehicles (ATVs)*. ATVs are three- and four-wheeled motorized off-road vehicles which, to date, have claimed the lives of nearly 900 people, half of whom have been children.

In October, 1987, Massachusetts and a number of other states called for a meeting with American Honda Motor Company, the manufacturer of nearly 70% of the ATVs sold in the United States. Our organizational efforts helped to recruit 28 states, plus the territory of Guam, to be represented at this November meeting.

We wanted to discuss a number of safety issues, including a possible ban and recall of ATVs, but Honda's presentation ignored our concerns.

On December 30, 1987, the U.S. Department of Justice filed a preliminary settlement decree in U.S. District Court between the Consumer Product Safety Commission (CPSC) and the five ATV manufacturers—Honda, Yamaha, Kawasaki, Suzuki, and Polaris. The settlement required the industry to implement a number of safety measures, including a suspension of sales of three-wheeled vehicles, mandatory changes in the advertising and promotion of ATVs, letters of warning to ATV purchasers, new warning labels and signs, and free training. However, because the decree did not allow ATV purchasers to return their vehicles and obtain restitution and did not call for a ban of all ATVs which do not meet certain basic performance standards, Attorney General Shannon and other attorneys general called the settlement deficient.

On February 23, 1988, thirty-two states, led by Massachusetts, California, and New York, filed an amicus brief responding to the terms of the preliminary consent decree.

On April 18, 1988 Attorney General Shannon represented the 32 states in arguing in U.S. District Court that the decree was inadequate to protect the lives of children and prior ATV purchasers. The Attorney General told the court that children under 16 are not able to competently operate these complex vehicles and that ATVs should not be sold for children's use. He stated that three-wheelers should be taken off the market and that the only effective remedy for current owners is the refund offer by the manufacturers to anyone who wants to return their vehicles.

As a result of the argument, certain modifications were made in the final decree before approval by Judge Gerhard Gesell.

At the winter meeting of the National Association of Attorneys General (NAAG), the Association adopted *guidelines addressing abuses by the airlines in fare advertising and frequent flyer programs.* As a member of the NAAG executive committee responsible for the guidelines' enforcement, Massachusetts is participating in a multi-state effort to ensure airline compliance.

While the guidelines have no regulatory effect, they serve notice to the industry about the kinds of practices the states view as violations of various unfair and deceptive practices laws. For example, the most controversial guidelines require the clear and conspicuous disclosure of limitation and restrictions on fares, as well as the total price of fares.

In *State of Alaska v. U.S. Department of Transportation,* Massachusetts and 24 other Attorneys General challenged a U.S. Transportation Department Order which would allow airlines to advertise the cost of international air transportation without listing the full price consumers must actually pay.

The lawsuit, filed in the U.S. Circuit Court of Appeals for the District of Columbia, was based on guidelines drafted by the NAAG. Under those guidelines, airlines are required to list the full price of all airfares advertised or stated to consumers.

On March 10, the Department of Transportation issued a new Order which would permit advertisers to exclude foreign departure taxes, customs fees, immigration fees, security fees, agricultural inspection fees, tourist and fuel surcharges, and any other charges that would be imposed by the federal, state, or local governments on the total advertised price. These added surcharges increase the round-trip ticket price by an average of $20-23 and apply to consumers purchasing tickets for international flights.

## ANTITRUST

The Antitrust Division enforces both federal and state antitrust laws and investigates any suspected violations of the law. The following are summaries of significant activities of the division in Fiscal Year 1988.

In *Commonwealth of Massachusetts v. Campeau Corporation*, the Commonwealth simultaneously filed a complaint against the Campeau Corporation, parent company of the Jordan Marsh Co., seeking to enjoin Campeau Corporation's acquisition of the parent company of Filene's Federated Department Stores, and a consent decree resolving the Attorney General's objections to the merger. The consent decree requires the Campeau Corporation to divest both Filene's and Filene's Basement Department Stores within 320 days of the court's final approval of the decree.

The Campeau Corporation has agreed to sell Filene's to the May Company and Filene's Basement to a capable purchaser who intends to continue to operate Filene's Basement as a viable competitor in the retail department store business. The consent decree prevented the two traditional department store rivals in New England, Filene's and Jordan Marsh, from being controlled by a common owner. The states of New Hampshire and Maine were also parties in this action.

In a *multistate insurance antitrust lawsuit*, the Commonwealth and seven other Attorneys General filed actions in the United States District Court for the Northern District of California against 32 defendants including insurance companies, reinsurers, intermediary brokers and trade associations. The complaint alleges that the defendants manipulated the market for commercial general *liability insurance*. The suit is a class action with the towns of Milford and Hanover named as class representatives.

The complaint charges that four U.S. insurers—Allstate, Hartford, Aetna, and CIGNA—conspired with members of Lloyd's of London, domestic reinsurers, the Reinsurance Association of America, and the Insurance Service Office (ISO) to significantly reduce coverage of their standard commercial general liability (CGL) insurance policy—the insurance purchased by most businesses, public agencies, and nonprofit organizations. CGL policies cover a wide range of liabilities to third parties resulting from actions or inactions of municipalities and businessess which cause personal injuries and property damage.

The complaint charges that the insurers and reinsurers unlawfully exercised their market power through boycotts and threats of boycotts to guarantee that no competitors could offer broader coverage than the reduced insurance they offered.

The suit is the result of a two-year, multi-state investigation led by Massachusetts, California, New York and Minnesota into the liability insurance crisis. On June 14, 1988, 10 other states joined in the lawsuit.

The actions seek treble damages for those public entities injured by the defendants. The complaints also ask the federal court to enjoin defendants from further violations of law and to order broad structural relief that will prevent further abuses.

In *Commonwealth of Massachusetts v. Pepsi-Cola Metropolitan Bottling Company, et al.*, the Division filed actions against 22 soft drink and beer distributors alleging violations of the Mandatory Beverage Container Deposit Act, also known as the Bottle Law. The statute requires distributors to segregate deposits in a "fund which shall be maintained separately from all other revenues". The Commonwealth charges the defendants with violating the statute by failing to keep deposits in separate bank accounts. The complaint seeks civil penalties and the payment of all unclaimed

bottle deposits to the Commonwealth.

The Division filed an amicus brief in *Patriot Cinema v. General Cinema, et al.*, on behalf of the Commonwealth and the states of Maine, New Hampshire and Rhode Island in the U.S. First Circuit Court of Appeals. The brief supports a movie theatre's appeal of the removal of its state antitrust action against several national motion picture exhibitors and distributors to federal court. The lower court ruled that plaintiff's state court action was an "artfully pled" claim under the federal Sherman Antitrust Act. The Antitrust Division argued that the lower court misapplied the "artful pleading" doctrine and so doing, created a federal preemption of state antitrust laws.

The Court of Appeals found the appeal moot because the plaintiff had represented in a subsequently filed state court action that it did not intend to pursue its antitrust claim, regardless of the outcome of the appeal. The Court, however, in a lengthy footnote, made it clear that it accepted the Commonwealth's arguments and that if faced squarely with the issue would reject attempts to remove state antitrust actions to federal court under the artful pleading doctrine.

In the Matter of *Piedmont-US Air Merger*, Piedmont Airlines and US Air entered into an agreement settling the Commonwealth's objections to their Piedmont-US Air merger. The Commonwealth had filed preliminary comments with the U.S. Department of Transportation raising concerns that the proposed merger would substantially reduce competition on a number of routes common to both carriers. The Commonwealth was concerned that the US Air-Piedmont entity would monopolize non-stop jet service between the city pairs of Boston and Baltimore, Rochester, Buffalo and Syracuse.

To satisfy these concerns, the airlines agreed to maintain a prescribed number of daily non-stop roundtrips for the city pairs. The airlines further agreed to maintain coach and discount fares on the flights, as well as flights from Boston to Ithaca, Elmira and Binghampton, at a level consistent with coach and discount fares in comparable markets.

The Commonwealth filed an action under the Massachusetts Antitrust Act in *Commonwealth of Massachusetts v. J.F., Inc. et al.* in Hampden Superior Court against seven liquor and convenience stores charging them with price fixing. The action charges the defendants with jointly advertising the prices of alcoholic and grocery products. The complaint alleges that the joint advertising of prices on these items constitutes a per se violation of the state antitrust act.

## CIVIL RIGHTS

The Civil Rights Division enforces the Massachusetts Civil Rights Act which authorizes the Attorney General to seek injunctive relief when the exercise of legal rights is interfered with by threats, intimidation, or coercion. A total of 21 new injunctions against 62 defendants were obtained by the Division involving racial, religious, and anti-gay violence. Criminal contempt arising out of violations of a previously acquired injunction was issued against one defendant.

A total of 11 injunctions with 25 defendants involved incidents in Boston. Three of the cases arose in Dorchester, two in downtown Boston, two in Charlestown, one in Roxbury, one in South Boston, one in Hyde Park and one in Roslindale.

Four injunctions involving 12 defendants occurred in Somerville. Two injunctions involving six defendants occurred in Lynn. One injunction involving three defendants occurred in Stoughton. One injunction against 10 defendants occurred

in Brockton. One injunction involving four defendants occurred in Wellesley. One injunction involving two defendants occurred in Medford.

IN *Commonwealth v. Guilfoyle*, the Supreme Judicial Court affirmed the granting of a permanent injunction against the defendant for his participation in racial incidents that took place in the Savin Hill area of Dorchester. The Court held that juvenile defendants in civil actions under the Massachusetts Civil Rights Act are not entitled to the special protections of juvenile statutes; the scope and duration of the injunctions were highly reasonable and within the sound discretion of the trial judge; there is no right to a jury trial under G.L. c. 12 sec. 11H; and preponderance of the evidence is the correct standard of proof in such actions.

The Division *convened a group of Somerville* civic, education, social service, law enforcement and housing leaders to *discuss problems of racism and racially motivated violence in the city.* Discussions included the need to communicate the message that civil rights violations are illegal, reviving recreational programming for youth, street outreach to older adolescents, and the dearth of women and people of color in leadership positions in the city.

Attorney General Shannon informed the *Quincy School Committee* that its policy requiring employees to report a diagnosis of AIDS or evidence of HIV infection violated privacy and anti-discrimination laws. The School Committee rescinded the policy two days later.

The Attorney General filed suit (*Attorney General v. Harold Brown*) against a private landlord, alleging violations of the Massachusetts Anti-Discrimination Law and seeking declaratory and injunctive relief for recipients of federal housing subsidies (Section 8 certificate holders). The complaint alleged that the landlord's refusal to rent to recipients constitutes discrimination "solely because the individual is such a recipient" in violation of M.G.L. c 151B sec 4(6) and that, since most recipients are members of racial minorities, the policy discriminates on the basis of race in violation of Sec. 4(10).

The Housing Court granted the Attorney General's motion for summary judgment on both allegations. Brown appealed and the Supreme Judicial Court granted direct appellate review. The SJC later reversed the summary judgment on the basis that there are disputed issues of fact material to a determination of whether the landlord's reason for refusing to accept Section 8 tenants were legitimate business reasons which may constitute a defense to liability. The case has been remanded to the Housing Court for trial on this issue.

In *Simard v. Residential Care Consortium*, an action was brought in the Bristol County Superior Court by the neighbors of a Fall River residential and educational facility for homeless families. The suit challenged the Fall River Zoning Board's determination that the facility is exempt from zoning regulation because of its educational purpose and its operation by a non-profit educational corporation. The Attorney General moved to intervene on behalf of the Department of Public Welfare which funds the facility and others like it throughout the Commonwealth. This is the first case considering the application of the education use exemption to a DPW-funded facility for homeless families.

Division attorneys filed a number of *amicus cureau* briefs during the fiscal year. In the case of *Patterson v. McLean Credit Union*, the Attorney General filed a multi-state *amicus* brief in the U.S. Supreme Court urging the Court to let stand its 1976 decision in *Runyon v. McCrary*, which prohibited discrimination on the basis of race in the making of contracts between private parties. (The Supreme Court, in an highly unusual move, ordered reargument of the case.) The Attorney General

was joined in the brief by Attorneys General from 46 other states and the District of Columbia, U.S. Virgin Islands, Puerto Rico, and Guam.

In the brief, the Attorneys General argued that the states have an interest in defending the precedent and thereby ensuring that citizens view government—and particularly the courts—as an evenhanded enforcer of legal guarantees of nondiscrimination. The brief also argued that no compelling changes in society or the law suggest that the court should reconsider its interpretation in *Runyon*.

The Attorney General entered into an agreement with the *Lakeside School* in Peabody, a school for emotionally and developmentally deprived boys, to ensure that present and future employees are not retaliated against for reporting incidents of suspected abuse to the Department of Social Services at the Office for Children.

In *Commonwealth v. Board of Selectmen of Town of Leicester*, attorneys from the Civil Rights Division and Government Bureau obtained a consent judgment for preliminary relief in Suffolk Superior Court from the Town of Leicester, assuring that they would not conduct the presidential primary election in a location not accessible to handicapped and elderly persons. The Selectmen had, until threatened with state and federal court lawsuits, refused to comply with the Secretary of State's requirement that a second floor polling place at the Town Hall be accessible. Since Leicester votes by paper ballot, providing an accessible polling place involved moving several tables and boxes from the second floor to a first floor conference room.

Based upon a complaint from the Office of Handicapped Affairs and at the request of the Secretary of State's office, letters were sent to seven Massachusetts towns and one city demanding that polling places be brought into compliance with federal and state law requiring accessibility. The seven towns agreed to make the necessary changes and certify the accessibility of their polling places. By the end of the fiscal year, the City of Everett had not agreed to make the necessary changes.

This office was contacted regarding with refusal by the managers of Harbor Point (the reconstructed Columbia Point housing development in South Boston/Dorchester) to allow residents with dependent family members younger than 55 to live in the "adult" building in the development. Many of those younger dependents were mentally disabled and the elder residents did not want to be forced to choose between continuing to care for their relatives and living in the new "adult" building. At a series of meetings with the MHFA and the Harbor Point managers it was made clear that the federal law would not permit the exclusion of dependents from the federally subsidized units in the adult building. The affected residents were permitted to move into the adult building with their dependents.

Through the *Community Access Monitors* program, people with disabilities monitor and assist developers, builders and owners of buildings in complying with the state Architectural Access Code. A New Bedford developer issued a no trespass order against a monitor who came onto the construction site of a restaurant to determine whether the building complied with the code. We negotiated with the developer to revoke that order.

During fiscal 1988, the Commonwealth participated in a 14-day federal trial as a defendant intervenor in the case of *New Life Baptist Church, et. al v. Town of East Longmeadow, et. al.* A Memorandum and Order held that the private school approval process, as applied by the defendant town, school committee, and school official, violated the plaintiff's right under the Free Exercise Clause of the First Amendment of the United States Constitution. An appeal was filed with the First Circuit Court of Appeals.

The Department brought legal action against an opthalmologist who participated in the Medicaid program and who had *discriminated against two Medicaid patients* with acute medical needs by denying them care unless they paid him cash prior to treatment. The case was settled by the physician's agreement to pay an administrative penalty and to refrain from applying any criterion other than the patient's need for medical care, the professional ability of the doctor to provide the type of medical care needed by the Medicaid recipient, and the availability of time in which to treat the patient.

The Division responded to numerous written complaints and phone calls. Most of the complaints were referred to other government agencies or to the private bar, but several resulted in action by the Division.

The Division continued to work with community groups representing a broad range of civil rights concerns. Division staff spoke at numerous community and law enforcement meetings and conferences.

## ENVIRONMENTAL PROTECTION

The Environmental Protection Division serves as litigation counsel on environmental issues for all state agencies, particularly those within the Executive Office of Environmental Affairs. The Division handles all of the Commonwealth's civil litigation to enforce environmental protection programs established by state laws and regulations. The Division brings suits to enforce the Commonwealth's regulatory programs governing air pollution, water pollution, wetlands, hazardous waste, hazardous materials, solid waste, water supply, "right-to-know," pesticides, waterways and billboards, and it defends decisions made by state agencies that administer environmental programs. In addition, based on the Attorney General's broad authority to protect the environment of the Commonwealth, the Division initiates and intervenes in state and federal litigation, and participates in administrative hearings before federal agencies on significant environmental issues.

As a result of its enforcement efforts, the Division receives substantial federal grant money from the Environmental Protection Agency.

This fiscal year the Division recovered $1,849,773.90 in penalties and other payments. In addition, many cases have resulted in court judgments requiring private parties to undertake costly cleanups—a significant saving for the Commonwealth.

A consent judgement was entered in Suffolk Superior Court in *DEQE v. Environmental Systems Recovery Corp., et al.*, a suit against an asbestos removal contractor and two of its corporate officers. Under the settlement the defendants paid a $30,000 civil penalty and were prohibited from conducting future asbestos removal activities in the Commonwealth.

A consent judgment was entered in Suffolk Superior Court resolving *DEQE v. AMIFF Housing Associates et al.*, a case against the owner and property manager of a Boston apartment complex. The Complaint alleged that an employee of the property manager was found removing asbestos from the basement without taking the precautionary measures and giving the advance notice required by law. Under the judgement, the defendants will pay a civil penalty of $25,000, and undertake an asbestos hazard abatement program at their properties throughout the Commonwealth. They will also train employees regarding asbestos hazards.

A consent judgment was entered in Suffolk Superior Court settling *DEQE v. Dartmouth Finishing Corp.*, involving a New Bedford textile finishing company. According to the complaint, Dartmouth Finishing had substantially underreported

its rise of volatile organic compounds (VOCs) and failed to seek DEQE approvals for its plant and new equipment. VOCs are chemicals which form ozone when combined with sunlight. In the settlement, Dartmouth Finishing paid a $110,000 civil penalty and was ordered to come into full compliance with state air regulations.

In the case of *Commonwealth of Massachusetts v. Craig Systems Corp.*, a consent judgment in Suffolk Superior Court settled this case against a corporation in Amesbury charged with contributing to ozone pollution in the Commonwealth. Craig Systems Corporation, a manufacturer of military equipment, was charged with discharging excessive amounts of volatile organic compounds (''VOCs'') into the air through their production processes. Ground level ozone contributes to smog and can cause health problems such as difficulty in breathing, eye irritation and increased susceptibility to respiratory infections.

The complaint alleged that the Amesbury facility began operations without obtaining the required state approval of air pollution equipment to control VOC emissions. The company's equipment has now been approved by DEQE and the consent judgment binds the company to operate in compliance with that approval. In addition, the company paid a civil penalty of $60,000.

In *Commonwealth of Massachusetts v. ICI Americas, Inc.*, a consent judgment filed in Suffolk Superior Court required ICI Americas, Inc., a chemical manufacturing company located in Dighton, to pay civil penalties totalling $157,500, in settlement of claims under both the Clean Air Act and the Hazardous Waste Management Act.

A complaint filed simultaneously with the consent judgment charged that ICI Americas emitted excessive amounts of VOCs in manufacturing an anti-oxidant product known as ''Topanol.'' The complaint alleged that the defendant continued to manufacture Topanol even though its new air pollution control equipment installed to control VOC emission levels had broken down. As a result, amounts of VOCs in excess of that licensed by DEQE were emitted into the air. The complaint also alleged that ICI exceeded the limit of hazardous waste allowed to be stored under its license.

In *Commonwealth of Massachusetts v. Humboldt National Graphics, Inc.*, the Division filed a consent judgment in Suffolk Superior Court thatt required the owner of a North Abington printing facility to pay a civil penalty of $60,000. The company was charged with violating the state's Clean Air Act by emitting excessive pollutants and operating without proper air pollution control equipment.

Under the terms of the consent judgment, Humboldt National Graphics, Inc., a California-based company that operates the printing plant, is also required to install pollution control equipment for the facility's three presses no later than May 31. The company is also enjoined from ever operating its equipment. The printing plant is located at 380 North Avenue.

The judgment settles a lawsuit filed in August 1987 that alleged that three offset printing presses operated by Humboldt were emitting air pollutants that exceeded the maximum capacity allowed by DEQE. The complaint also alleged that emissions from the facility were ''hazardous to the health of people with respiratory ailments, are injurious to vegetation, and are unsightly and odorous.'' Humboldt was first notified by DEQE in August 1986 that it was in violation of departmental regulations promulgated under the Massachusetts Clean Air Act.

The *Matter of DEQE v. Ace Auto Body, et al.*, involved the Eastern Chemical hazardous waste site in Worcester that operated as a chemical reprocessing and treatment plant until it went bankrupt in 1981. On October 15, 1987, a final judg-

ment by consent in Suffolk Superior Court required 845 companies which transfered hazardous waste to the site to pay $365,444 to DEQE for its cleanup costs. About 27 companies remain in the case, and we are negotiating to recover the remaining cleanup costs, about $200,000. A complaint naming the companies was filed simultaneously with the consent decree.

A final judgment by consent was entered in *DEQE v. Plaza Oldsmobile, Inc., et al.*, a case involving a fuel oil spill from an underground tank in Braintree. The oil spilled into a river that leads to an abandoned reservoir. The owners of the tank reimbursed DEQE for $16,354 in costs incurred in cleaning up the spill. The owners also agreed to conduct a site assessment to determine whether further cleanup is necessary, and they agreed to cover any future cleanup costs.

The Division filed a complaint and joint consent decree in U.S. District Court with the U.S. Environmental Protection Agency requiring three companies and the Town of Westboro to clean up a hazardous waste site (*DEQE v. Koppers Co., Inc. et al.*). The site, known as the Hocomonco Pond site, was the former location of a wood treating operation that disposed of Creosote and other waste directly into pits and lagoons, causing contamination. The defendants are required to undertake a cleanup plan that will cost $5.5 million. Site monitoring will be conducted for at least 30 years to ensure that further contamination does not occur.

A final judgment was entered on August 18, 1987 requiring *Cumberland Farms, Inc.* of Dedham to pay a $50,000 civil penalty for unpermitted discharges of pollutants from the company's Canton site. The final judgment also reserved the Commonwealth's rights to recover damages caused by any past or future discharges at the site.

A suit was filed on September 14, 1987 seeking to recover more than $200,000 incurred by the state in cleaning up a hazardous waste site in Holliston. (*Commonwealth of Massachusetts v. Ruth L. Bird, et al*) The site was used to dispose of refuse and hazardous waste including 400,000 tires. The complaint also seeks final site cleanup and civil penalties for violations of G.L. c. 21E and G.L. c. 111, §150A.

In *Commonwealth of Massachusetts v. Mobil Chemical Corporation*, a final judgment was entered requiring Mobil to pay a $67,300 penalty for failing to notify DEQE of a 1985 release of hazardous material at the company's Holyoke plant. The penalty is the largest recovered under G.L. c. 21E. Mobil also agreed to conduct an assessment of the site and undertake cleanup of any remaining hazardous material.

In *Commonwealth of Massachusetts v. Joseph Wozniak and Harold Quinn*, a complaint sought to recover more than $50,000 in costs incurred by the DEQE for the cleanup of hazardous material at a site in Spencer. The site, which has been operated as a junkyard, was the site of a 1986 fire involving more than one million tires. The fire resulted in the discharge of hazardous materials to the air, surface and groundwater.

On December 2, 1987 a complaint for contempt was filed to enforce a July 28, 1987 final judgment which required defendants to pay DEQE $17,964.19 for the cleanup of hazardous materials and to prepare an assessment and cleanup plan for a site in Roxbury. (*Commonwealth of Massachusetts v. Edward Lyons, Jr., et al.*) The defendants paid $2,500 but defaulted on other payments and did not submit the cleanup plan. A trial was held in Superior Court (Rouse, J.) on December 29, 1987. After the trial we sought an order requiring the payment of the outstanding $15,464.19, imposition of a penalty of $1,500, payment of $500 in attorney's fees, and follow-through on the cleanup plan.

A final consent judgment was entered in *Commonwealth of Massachusetts v. Trombetta, Inc. and Charles Trombetta* awarding a $10,000 civil penalty for violations of a 1985 Administrative Consent Order and M.G.L. c. 21C. The judgment also provided injunctive relief requiring the defendant to curtail storage and burning of waste oil, and to submit a closure plan to the Department for approval that specified how the remaining waste oil storage tanks will be cleaned, decontaminated, and disposed of. Any future storage or burning of waste oil must be in compliance with necessary state and local permits or licenses.

A final judgment by consent was entered in *DEQE v. Town of Sandwich* requiring the town to bring its landfill into compliance with the Solid Waste Act and regulations. The landfill had been operating in violation of the law for many years, and the Town had ignored several DEQE administrative orders to bring the landfill into compliance. The judgment requires Sandwich, inter alia, to undertake groundwater monitoring and implement a closure plan for a section of the landfill. A complaint was filed simultaneously with the judgment.

In *Commonwealth v. Anthony J. Bonacorso, et al.* a final judgment by consent was filed. This case involved violations of the Wetland Protection Act in the Belle Isle salt marsh in Winthrop. The judgment settles a complaint for contempt brought by the Commonwealth when Bonacorso violated an earlier consent judgment that required him to remove fill from the marsh and stabilize the shoreline. The judgment filed in October requires Bonacorso to remove additional fill placed in the marsh and pay a $6,000 penalty.

In the *Matter of DEQE v. Spencer and Spencer v. DEQE*, Judge Cross of the Hampshire Superior Court approved a consent judgment in these two consolidated cases involving Spencer's municipal landfill. DEQE had been negotiating with town officials for a year to bring them into compliance with regulatory requirements. DEQE also wanted to close the landfill which had contaminated nearby groundwater and threatened to contaminate one of the town's two public water supply sources. When negotiations broke down, the town sued DEQE, challenging its right to shut down the landfill. We filed an enforcement action, and moved for consolidation of the two suits and for trial in July. The night before the trial was to begin, the town selectmen agreed to the entry of a consent judgment that requires the landfill to close by September 15 and to be capped with final cover before winter.

A decision and memorandum in *DEQE v. Rocco* was issued in Suffolk Superior Court. This case involved a privately owned landfill in Tewksbury. The decision came after a three-day trial in April. Judge Tuttle found that Jeanette Rocco, the landfill's owner, had violated the Solid Waste Disposal Act by failing to comply with numerous operating requirements. He also found her liable for violating the Clean Waters Act because the landfill was generating leachate that contaminated surrounding surface water and groundwater. In addition, the preliminary judgment secured in 1982 was made permanent and the judge ordered Rocco to submit a closure plan. He also found that there was insufficient evidence to find that Rocco's son was the operator of the landfill, which would have made him liable for closure as well.

In August, Massachusetts joined six other Northeastern states and five environmental groups in a complaint against EPA for failure to comply with the Clean Air Act. (*State of Maine v. Lee Thomas*) The complaint alleges that the EPA has failed to comply with a mandatory duty under the Act to promulgate regulations addressing the problem of impaired visibility in wilderness areas caused by regional

haze, or smog. Regional emitted haze in the Northeast is primarily caused by pollutants emitted in the Midwest, the same pollutants that contribute to the problem of acid rain. The Clean Air Act required EPA to issue regulations by 1979. On October 14, 1987, plaintiff filed a motion for summary judgment.

The Commonwealth joined six other states in filing a petition with the EPA compelling the agency to implement a *solution to the problems of interstate and international movement of pollutants that cause acid rain.* Acid deposition from rain and snow has been shown to cause acidification of surface water bodies, destruction of fish and wildlife, corrosion of buildings and monuments, regional haze, and harm to human health.

The petition asks EPA to publish for public comment its earlier determinations that air pollutants generated in this country endanger public health and welfare in Canada, and that the United States has reciprocal rights to control acid rain producing pollutants that cross the border from Canada. Once these determinations are officially published, EPA must require those states which cause acid rain through emissions to impose additional controls on pollution sources.

In *City of Quincy v. EPA and MWRA*, the city filed a notice of dismissal of this case challenging the purchase of the General Dynamics shipyard by the MWRA. The EPA and the MWRA had both filed motions to dismiss Quincy's complaint for lack of subject matter jurisdiction and failure to state a claim.

A consent judgment was entered in Suffolk Superior Court resolving *DEQE v. Charles River Pollution Control District Commission*. This case alleged Clean Waters Act violations against the District Commission, which operates a sewage treatment plant for the towns of Franklin and Medway. The plant discharges its effluent into the upper Charles River. Under the settlement, the Commission will make extensive repairs to the plant, improve operations and maintenance and address some long term operations concerns. The Commission must also pay a civil penalty of $30,000 for past violations.

In *Nolan v. DEQE*, after a five-day trial last summer, Superior Court Judge William H. Carey found in favor of the Commonwealth and permanently enjoined a fully constructed Firestone Service Center from discharging sewage and any other pollutants. This Court found violations of the State Environmental Code.

In February the *Town of Winthrop and the M.W.R.A.* filed a Stipulation of Dismissal with prejudice in this two-year-old case. The action ended the Town's challenge to the Authority's decision to build the new sewage treatment plant for the Boston metropolitan area on Dear Island. We had filed a Motion for Summary Judgment on behalf of the defendant, which had been scheduled for argument by the court. But at the last minute, the parties reached agreement on compensating Winthrop for having the plant as a neighbor. As part of that agreement, the Town agreed to dismiss its complaint.

In *DEQE v. Henrikson's Dairy and Rodney Henrikson*, a final judgment was entered in Superior Court whereby the defendant, Rodney Henrikson, agreed to pay a civil penalty of $8,000 to settle the Commonwealth's water pollution claims against the dairy. The case was referred in May 1985 for enforcement of the Clean Water Act and DEQE regulations in connection with the dairy's discharges of milk process wastes into a river.

In *Anne Place et al. v. Town of Chatham*, the plaintiffs own property located on a coastal bank and a coastal dune, two areas subject to the Wetlands Protection Act G.L. c. 131, §40. ("Act"). Until January 1987, a barrier peninsula protected the plaintiffs' property from the ocean. Last January, several winter storms carved

an inlet in that peninsula. To protect their homes from the ocean, the plaintiffs want to build a stone revetment on their property without complying with the Act. Rather than file a notice of intent with the Chatham Conservation Commission as required, they bought this action seeking a temporary restraining order and preliminary injunction to stop the Conservation Commission and DEQE from enforcing the Act while they build the revetment.

On December 30, 1987, after issuing a TRO without notice to DEQE or this office, the court held a hearing to determine whether the court should issue such an injunction. Instead, on January 4, 1988, the court issued an interlocutory order which would remain in effect for 90 days. Under this order, the plaintiffs were required within 40 days to remove the stone revetment from the coastal dune. In addition, within 30 days the plaintiff must either file a notice of intent to construct a stone revetment on the coastal bank area or remove the revetment.

Opening briefs were filed on March 21, 1988 in the D.C. Circuit Court of Appeals by Massachusetts and others in a pending lawsuit challenging the five-year program for oil and gas leasing on the Outer Continental Shelf (OCS) approved by the U.S. Secretary of the Interior. (*National Resources Defense Council v. Hodel*) The leasing program is the national program for petroleum resource development on the OCS. The program approved by Secretary Donald Hodel proposes opening up roughly one-half of the OSC for development over the next five years, including the sensitive Georges Bank fisheries off the Massachusetts coast.

Massachusetts filed a joint brief with four other states and a number of environmental groups alleging numerous violations of the Outer Continental Shelf Lands Act (OCSLA) and the National Environmental Policy Act (NEPA).

The *Town of Wellfleet, et al, v. John W. Glaze*, is currently on appeal before the Supreme Judicial Court. It involves an exclusive-use shellfish license issued by Wellfleet for certain intertidal land. In July of 1987, the Superior Court issued a partial stay, pending appeal, of the permanent injunction previously issued against the defendant. The stay allowed the defendant to moor his boats over the oyster beds that are the subject of this litigation. The town subsequently sought relief from the Single Justice of the SJC, who transferred the town's petition to the Single Justice of the Appeals Court. We again joined as amicus and argued the case before the Single Justice on August 21, 1987. The court (Kass, J.) reversed the Superior Court's granting of the partial stay, thus saving the seeding oysters pending appeal.

*In Re: Sewalls Falls Hydroelectric Dam* the proponents of a dam project on the Merrimack River near Concord, New Hampshire, withdrew their licensing application from the Federal Energy Regulatory Commission. This formally ends a long dispute over the building of the dam. The Commonwealth intervened in the licensing proceedings in 1984, because of the damaging effects the proposed dam would have had on federal-state efforts to restore salmon and shad to the Merrimack River Basin. Through an agreement reached last year, the site will now be used as a recreational area managed by New Hampshire. A second licensing proceeding in which we have intervened is still pending. This involves a proposed dam on the Pemigewasset River, the largest tributary in the Merrimack.

## INSURANCE

The Insurance Division represents the interests of Massachusetts citizens who purchase insurance. A significant portion of the Division's work involves advocacy on behalf of consumers in insurance rate proceedings. The Division intervenes in

complex hearings, including automobile and health insurance rate setting.

The Division also litigates against insurance companies, stock brokers and insurance agents on behalf of consumers. Cases are brought to obtain injunctive and restitutionary relief for insurance consumers.

The Division also routinely participates in legislative and administrative hearings concering proposed laws, regulations and other policy issues.

The actions of the Division saved Massachusetts consumers $645 million this year.

The Insurance Division filed the Attorney General's Advisory Filing on *1988 automobile insurance rates recommending a 4.4% increase,* in contrast to the industry's request for a 32.3% rate hike—a difference of almost $500 million to Massachusetts consumers, or more than or over $150 per insured car.

At the same hearing, the Division submitted an advisory filing on cost containment issues. The filing included the results of an independent study commissioned by the Attorney General which found that repair estimates for automobiles believed to be fully insured were 32.5% higher than for those cars with identical damage but believed to be uncovered by a collision policy. The Attorney General's cost containment filing included an analysis of differences in payments on claims from the Commonwealth Auto Reinsurers (the high risk pool) and the voluntary market which indicates that insurers are not managing claims in CAR as carefully as in the voluntary market. The Attorney General's final 1988 rate recommendation after consideration of cost containment issues was a 1% decrease.

In mid-December, Insurance Commissioner Roger Singer established an average automobile insurance rate increase of 8.5% for Massachusetts drivers.

On December 15, 1987, the Supreme Judicial Court issued a Decision on the insurance industry's appeal of the 1987 auto rates originally set by former Insurance Commissioner Peter Hiam. The Court upheld the Commissioner's decisions in most respects but remanded the case to Commissioner Singer, directing him to make findings and, if necessary, hold future hearings on certain narrow issues.

After arguing that further hearings were not necessary, the Division participated, under protest, in a *remand hearing* conducted by Singer on less than one week's notice. The insurance industry proposed further increases of 13% in each of the two prior years' rates. The remand hearing resulted in a muddled decision which allows an aggregate 17% increase in rates for the two years, or $280 million in premiums, which is the largest one-time rate hike in the history of Massachusetts.

On March 29, 1988, the Attorney General appealed the decision to the SJC, alleging that the many procedural errors at the hearings, as well as substantive error in the Remand Decision itself, produced a substantial denial of justice and a violation of the law and the due process clauses of the Massachusetts and United States Constitutions.

In early October, the Division entered into a settlement with Blue Cross/Blue Shield on a pending request for an increase in *Medex (Medicare supplement) rates.* BC/BS had originally requested an increase of 18.4% in the premium rates paid by its Medex subscribers, who are elderly or disabled. The Division strongly opposed the increase as excessive and further argued that the filing rate request was procedurally inappropriate and merited dismissal. In particular, the Division argued that BC/BS completely failed to demonstrate that the companies used adequate or effective methods for containing health care costs as required by statute.

Following negotiations, the companies cut their request almost in half, settling for a 10.5% rate increase. Because the companies' 1986 rate request of 9.4% was denied—based in large part on the Division's advocacy in that hearing—the 10.5%

actually represents two years' or slightly more than a 5% annual rate increase, the smallest hike in Medex rates in years. Because of the Division's intervention, consumers saved $52 million.

The Division participated in the hearing to consider a 64.3% or $60 million rate increase requested by *Blue Cross/Blue Shield* on its *non-group health insurance* covering 160,000 Massachusetts residents. As a result of the Attorney General's efforts, the average insurance increase was slashed to 21.3%. The savings to purchasers of Blue Cross/Blue Shield non-group health insurance totalled $20 million.

A hearing in the Spring of 1988 considered the *first major reassignment of towns into the 26 automobile rating territories* since 1984. Issues include a new measure of the severity of accidents for each town into the calculation of town expected losses; the volatility of the model used to calculate expected losses; the method for clustering the towns ranked by expected losses into the 26 territories; and the cap to be applied to territory movements.

In May of 1988, at the annual hearing to determine the feasibility of *competition in the automobile insurance market,* the Attorney General presented a *proposal for a gradual transition to competition.* The Attorney General strongly urged the Commissioner to introduce competitive pressure to control run away costs. We proposed instituting "flex rating" which would have allowed insurers to set their own rates for property damage coverages within a range of 10% more or less than the prior year's premium. The Insurance Commissioner rejected competitive rating for 1989 auto rates.

The Insurance Division took action against several *insurers who improperly denied claims under pre-existing condition clauses.* A synopsis of those cases follows.

*Aetna Life Insurance & Annuity Company* denied claims under individual Short Term Medical Policies of Accident and Sickness insurance on the basis of "pre-existing symptoms." The company did so without documenting evidence of actual treatment or observation prior to the policy's effective date, and with knowledge that there was no treatment or observation prior to the policy's effective date. Following an investigation by the Division, Aetna agreed to enter into a consent judgment. The judgment required Aetna to pay $30,538.99 in previously denied claims, withdraw its pre-existing symptoms rider, and educate its claims processing staff to assure compliance. Aetna also paid $6,500 for the costs of the investigation.

*Golden Rule Insurance Company* denied coverage for Caesarian sections on health policies when the insured had a previous Caesarian section. The company has withdrawn the Caesarian section exclusion rider and is examining its files to identify claims improperly denied under the rider.

The Division enforces the provisions of Massachusetts law which *mandates certain health insurance benefits* for all insureds. What follows are examples of such enforcement actions.

Health and Education Services, Inc., a group health insurance company, refused to extend coverage for 31 days after termination of employment as mandated by Massachusetts law. After the Division's intervention, the company extended coverage and the consumer's medical bills incurred after termination of employment were paid by the company.

*Divorced spouses' of members of group health insurance policies* were denied continuation of eligibility for benefits under their former spouses' policies as mandated by state law. After intervention by the Division the group policyholder retroactively extended continuation of health insurance to the divorced spouses without payment of additional premiums.

*Employers who failed to pay group health insurance premiums* after withholding a portion of their employees' wages for such premiums were investigated by the Insurance Division.

The major enforcement action in this area was brought against *Andrew Wilson Co.*, a Lawrence manufacturer, and its president, E. Parker Stokes, alleging that the company had failed to pay the group health insurance premiums since October 1987 and had not informed its employees. The company had been collecting $12 per week from employees since February 1988 for health insurance. The complaint alleged that the company has also failed to make credit union deposits, United Way contributions, child support payments to the Probate Court, and other payments deducted from employees' paychecks. The Superior Court enjoined the defendants from deducting such funds from employees' paychecks unless the monies were remitted to the appropriate entities and accounts within 48 hours. As a result of the Division's actions, $60,000 of medical bills incurred and reported from October 1, 1987 to February, 1988 were paid.

Subsequently, Andrew Wilson Company filed for bankruptcy. The Division intervened before the U.S. Bankruptcy Court to assert that the employees are creditors of the debtor company so that their outstanding medical bills will be recognized as priority debts of the firm.

Other actions against employers who withheld premiums and failed to remit them to insurers resulted in the payment of $5,155 in medical bills.

The *Massachusetts Restaurant Insurance Trust*, administered by Associated Insurance Management in Westborough, sent notices of cancellation to 138 employer groups covering more than 1,000 employees. The Trust had not disclosed to employers prior to the cancellation notice being sent that "excess" claims was a basis for cancellation. The Trust rescinded the cancellation notices and continued insurance coverage for all groups remaining in the Trust. For those groups which secured other coverage following the cancellation notice, the Trust agreed to provide coverage for pre-existing conditions not covered by the new carrier.

In November, *South Shore Hospital* entered into an assurance of discontinuance after discriminatory treatment of a Medicare beneficiary was alleged.

In 1985, Medicare began reimbursing Massachusetts hospitals caring for Medicare beneficiaries at a fixed amount per admission, rather than per day. In other states this change led to discriminatory treatment by hospitals of those Medicare patients who were likely to need longer stays. Massachusetts sought to preempt such problems by legislatively declaring such discrimination illegal under the new system.

In late 1985, an acutely ill 82-year-old Medicare beneficiary was first told he would be admitted to South Shore Hospital, but was unexpectedly sent home. He was admitted the next day to another hospital, where he died several weeks later. The Division's investigation, supplementing inquiries by the Department of Public Health, produced evidence that the decision was triggered by the hospital's concern over reimbursement under the new Medicare system.

After extensive negotiations, the hospital agreed not to discriminate in the future, to institute extensive new staff training on Medicare and patients' rights, to implement record keeping to monitor treatment of Medicare patients, and to pay $40,000 into the Local Consumer Aid Fund. The money has been earmarked for use in educating and protecting the rights of elderly health care consumers.

A 20-year payment universal life insurance policy was purchased by a 76-year-old woman. She understood that the policy was a single premium investment

equivalent to a money market fund. One year after her payment of $38,958, she received a statement showing that her account dropped in value by $11,160.05. She also received a premium due bill for $20,000. After the Division intervened, *John Hancock Mutual Life Insurance Company* cancelled the universal life policy and made a full refund.

The Division intervened on behalf of insurance purchasers on a variety of claims settlement practices problems. The Division's actions resulted in payment of *$6,283 of improperly denied claims* to consumers.

The Division prepared testimony which the Attorney General presented to the Insurance Commissioner on proposed regulations governing HIV-Related testing and *the use of AIDS-related information for life and health insurance.* The Attorney General expressed his support for the proposed regulation which offered critical protection and privacy to all persons who apply for health and life insurance.

After five years of work by the Division, *sex discriminatory insurance policies will be banned in Massachusetts.* The Commissioner of Insurance, relying on a formal opinion of the Attorney General issued in January, 1987 issued a draft regulation which prohibits discrimination in the premiums and benefits under all insurance policies issued or renewed after September 1, 1988. The final regulation adopted the more comprehensive remedy for existing discrimination recommended by the Attorney General.

The Division petitioned the Insurance Commissioner to amend his regulation defining *pre-existing conditions* to preclude the denial of claims where there has been no medical diagnosis or treatment.

The Division argued that the existing regulation which permits claim denials in cases where there were "symptoms which would have led an ordinarily prudent person to seek medical advice or treatment" erodes mandated benefits coverage. The regulation also unfairly and adversely affects individuals with "silent" diseases such as mental illness, alcoholism and AIDS.

The Insurance Division intervened in a hearing, held by the *Auto Damage Appraiser's Licensing Board*, concerning Liberty Mutual Insurance Company's implementation of a body shop cost containment program. The Liberty program advises consumers of their right to choose an auto body repair shop. If requested by the consumer, Liberty provides a list of quality repair shops in their geographic area. Over the years, at auto rate hearings, the Attorney General has advocated the implementation of such programs as a method of reducing repair loss and expense. We argued that Liberty's program was consistent with the auto cost containment law, Chapter 622 of the Act of 1986, decisions of the Supreme Judicial Court, and the regulations of the Insurance Commissioner.

The Insurance Division presented testimony in support of emergency regulations implementing a recently passed statute mandating insurance coverage for medically necessary diagnosis and treatment of *infertility*. Our testimony applauded the regulations for making explicit what was clearly intended by the statute—that *in vitro* fertilization procedures be covered, as well as other non-experimental treatments. We recommended alternative language for one section of the regulations which had the potential for discriminatory application. This legislation would largely resolve a problem which repeatedly requires our intervention.

Division attorneys drafted legislation requiring insurance companies to *notify employees when their group health insurance premiums are cancelled for nonpayment of premiums by employers.*

The Division, working with the Attorney General's Health Care Task Force, drafted testimony presented by the Attorney General supporting *access to health care for the Commonwealth's 600,000 uninsured residents.* The testimony also opposed any transformation of Blue Cross/Blue Shield into two commercial, non-profit, charitable corporations, or to eliminate the benefits it receives from that non-profit status. BC/BS is currently the insurer of last resort, and as such, provides an essential service to elderly subscribers and those who cannot get health insurance through any group. The Attorney General said that, until a reliable alternative is in place, BC/BS must retain its charitable obligations to serve these populations, as well as the financial benefits (such as tax-exempt status) which support that coverage.

The Division testified before the Joint Committee on Insurance in support of a bill designed to *protect the privacy of insurance consumers.* There is now little regulation covering how insurers may collect information on consumers, what privacy protections apply once that information is in hand, and how insurers maintain the accuracy of that information. The bill imposes comprehensive protections on the collection of information and its dispersement. Notice and consent requirements are added, and extra protection is accorded to certain information which insurers could use to exclude anyone considered to belong to a group at risk for AIDS. We recommended that the bill be enacted to assure greater consumer protection in this area.

The Insurance Division testified and gave technical analyses on several *auto insurance "reform" bills.* The Division chiefly addressed the surcharge mechanism proposed by the insurance industry, called the "rolling reconciliation," the structure of the good driver credit plan, and various anti-fraud provisions.

The resolution of individual consumer complaints resulted in savings of approximately $30,000.

## PUBLIC CHARITIES

The Attorney General represents the public interest in the proper solicitation and use of all charitable funds. The Attorney General's enforcement role extends to a wide range of charitable activity to protect donors from diversion and waste of funds, and to ensure that the beneficiaries of charitable funds receive the intended benefits.

The Division's work falls into three main areas:

- Registering and receiving financial information from charities and fundraisers to assure accountability for charitable funds.
- Participation as an interested party in estates and trusts in which there is a charitable interest.
- Litigation to protect the public from misapplication of charitable funds and from fraudulent or deceptive solicitation.

Under M.G.L. Ch. 12 s. 8E, *all public charities*, with the exception of religious organizations and certain federally chartered organizations, *must register with the Division.*

In cooperation with the Secretary of State, the Division receives the Articles of Organization of newly filed G.L. c.180 non-profit corporations. The Division reviews the Articles to determine if the non-profit is a public charity. If it is a public charity, information about the charity is entered on the computer, and the organization is sent annual reporting material.

*This year 1,251 new charitable organizations' Articles were reviewed, determined to be charitable, and entered into the computer. More than 24,000 charities are registered with the Division.*

*All registered charities must submit annual financial reports to the Division.* The registrations and financial reports are public record and the public may view the files between 9 a.m. and 5 p.m., Monday through Friday. Annual filing fees of $25 per report totalled $255,550.

Under G.L. c.68, §19, *every charitable organization* which intends to solicit funds from the public, except religious organizations, *must apply to the Division for a solicitation certificate* before engaging in fundraising. During the fiscal year, *2994 certificates were issued and $29,940 in certificate fees were received and processed.*

Under §§22 and 24 of the new G.L. c.68, all persons acting as professional solicitors or professional fundraising counsel for soliciting charitable organizations must register annually with the Division. Solicitors must file a $10,000 surety bond and a copy of each fundraising contract signed with any charitable organization.

During the fiscal year, 144 registrations were received and approved. Fees received totaled $1,440. Of the registrations, 116 were renewals, and 28 were new registrations obtained as a result of increased enforcement of the registration requirement.

The Division protects the public from misuse by non-profit organizations of their statutory license to fund raise through *charitable gaming activities*, including the conduct of fundraising Las Vegas Nights, bazaars, and raffles.

The Division reviews the probate of *estates where there is a charitable interest.*

This Fiscal year, 2,022 new wills were received and reviewed, of which 1,652 involved charitable bequests. Seven-hundred executor accounts and 2,387 trustees accounts were reviewed and approved. The Division also reviewed and approved 122 petitions for sale of real estate and 72 petitions for appointment of trustees.

Seventy-one new probate cases were opened, and Division attorneys were involved in 810 other probate cases. These included petitions for *cy pres* or instructions to modernize or clarify outmoded trust terms. The Division reviewed and/or was involved in 4,166 other probate legal matters.

The Division also represents the State Treasurer in the *Public Administration of intestate estates* where the decedent has no heirs. Such estates escheat to the Commonwealth. The Division ensures that the estates are promptly administered and that the state receives its money. During the fiscal year, $423,124.31 in escheats were received. The Division also handles petitions from public administrators representing heirs in intestate estates who are found after an estate has been administered and are then entitled to a reimbursement of escheated funds.

During fiscal 1988, the Division reviewed and approved 67 intestate estates, 15 petitions for sale of real estate and 77 accounts in public administrations.

The Division is also involved in a number of municipal and private charitable trusts, among them municipal trusts held by the city of Boston and the towns of Reading and Townsend, as well as private charitable trusts held by Harvard University and Malden Industrial Aid Society.

The Charities Division is responsible for *enforcing the due application of funds by charitable corporations.* The assets of all charitable corporations in the Commonwealth are considered by law to be held in trust by the corporation for use for the purposes for which the assets were first obtained. The Attorney General represents the public's interest in the proper use of these assets.

To enforce the public's interest in the disposition of charitable assets, the Attorney General is party to all voluntary dissolutions of charitable corporations. All dissolving charities must submit draft dissolution pleadings. Once approved by this office, the pleadings are filed ex parte by the dissolving charity with the Supreme Judicial Court. We review pleadings to ensure that:

(1) there are adequate grounds for dissolution;
(2) charitable assets are not diverted to non-charitable uses, e.g. verifying the legitimacy of related-party loans to be repaid from charitable assets; and
(3) ensuring that any assets remaining after repayment of outstanding debts are transferred, with Court approval, either as restricted assets to a charitable corporation with a similar charitable purpose, or as restricted funds to a charitable corporation with broader purposes than those of the dissolving charity.

The Division approved 10 motions by dissolving charitable corporations for interlocutory orders of the SJC, thereby allowing assets to be transferred to other charities for similar charitable purposes. The Division also approved 15 final judgments dissolving charitable corporations.

A summary of the litigation engaged in by the Division follows.

The Attorney General filed a complaint alleging that the *Coalition for Reliable Energy* (CRE), its directors and its managing agent (BMc Strategies, Inc.) violated state law by deceiving the public to believe that CRE was a charity promoting all forms of reliable energy. In fact, we allege CRE is a front for the joint owners of Seabrook and designed solely to promote the nuclear power plant.

The defendants moved for a partial summary judgment, on the chapter 93A claim only, arguing that CRE's advertisements were not deceptive, that they were beyond reach of chapter 93A, and that they were protected speech under the First Amendment.

After hearing arguments from both sides, Judge Walter Steele denied CRE's motion. He held that CRE's ads satisfied the Supreme Court's criteria for finding commercial speech, because they were (1) paid for, (2) intended to influence consumer demand for purchase of Seabrook's electricity in a manner unrelated to the licensing of Seabrook, and (3) were economically motivated if (as CRE conceded for purposes of the motion) CRE is an alter ego for the Seabrook owners.

Judge Steele also held that CRE's ads constituted trade or commerce subject to Attorney General regulation under M.G.L. c.93A because they were in a business context and constituted use of a non-profit vehicle as a vehicle for profit. He also held that CRE's ads were not protected from regulation by the First Amendment right to petition because they were not directed to the Nuclear Regulatory Commission or to the public in their capacity as voters.

On June 7, 1988, following renewed discovery by the Attorney General, Judge Steele heard arguments on a CRE motion requesting him to exercise his discretion to report his decision for interlocutory appeal. CRE argued that judicial economy would be promoted by appeal, because an appellate finding that CRE's ads do not constitute commercial speech would dispose of the Attorney General's G.L. c.93A claim. The Attorney General argued in opposition that judicial economy would not be promoted by appeal because (1) the issue of commercial speech requires fact-finding of material disputed facts as to whether CRE is an alter ego for the Seabrook owners and whether CRE's ads are economically motivated; (2) those same facts must also be tried in order to dispose of the Attorney General's other

claims under G.L. c.12, §8 and G.L. c.68, irrespective of the G.L. c.93A claim; and (3) trial could moot the very issues CRE seeks to appeal. Judge Steele has taken CRE's motion under advisement.

In the case of *Wheaton College v. Shannon*, the college's Board of Trustees made the decision to admit men as degree candidates for the first time. As a non-profit charitable institution, Wheaton must by law use its assets to carry out the charitable purpose for which the assets were held or else seek court approval of any change of use. The Attorney General, as the overseer of public charities, was concerned that contributions to the college continue to be used for the purpose intended by the school's donors, especially donors to a recent Sesquicentennial Campaign which emphasized Wheaton's history and role as a women's college.

After lengthy negotiations, the Attorney General and Wheaton presented a comprehensive plan to the court which would permit Wheaton to become coeducational while retaining significant portions of its prior funds for the exclusive benefit of female students.

In the judicial proceeding for approval of this plan, nine donors to the Sesquicentennial Fund filed a joint motion to intervene, arguing that they had specifically intended that their donations benefit a women's college. The donors asked the court to order Wheaton to refund their donations, and to allow them to contest Wheaton's conclusion that its future viability as a single-gender college is seriously jeopardized by changing demographics. They also wanted to litigate how Wheaton's assets should be allocated in the *cy pres* proceeding. The Attorney General agreed that the donors have standing to raise private claims that their gifts have lapsed, but argued against standing to litigate issues involving Wheaton's use of assets for coeducational purposes.

After several hearings, the court approved the plan developed by the Attorney General and Wheaton, and the college agreed to offer to Sesquicentennial donors the opportunity to receive refunds upon request.

The case of *Commonwealth v. Resthaven Corporation* involved a nonprofit charitable corporation which has operated a nursing home in Roxbury for more than 50 years. In 1979, the Attorney General filed a lawsuit in Suffolk Superior Court against Resthaven to prevent physical and sexual abuse of patients, inadequate staffing, inappropriate use of physical restraints, inadequate restorative nursing care and failure to maintain sanitary conditions. Judge John Paul Sullivan appointed attorney Norman W. Huggins as a receiver to manage the nursing home. Huggins contracted with University Hospital (the "Hospital") to manage the facility, and by 1980, the patient care violations had ended, and Resthaven was recertified by the Department of Public Health (DPH).

On June 3, 1988, DPH determined that conditions had seriously deteriorated, that there were unsatisfactory sanitary conditions, and that there was an imminent danger of serious physical harm to patients. The Attorney General and DPH took immediate steps to require Huggins and University Hospital to correct those conditions.

On June 22, 1988, the Attorney General moved for appointment of a new receiver on the grounds that Huggins and University Hospital had failed to implement agreed-to steps to rectify conditions at Resthaven. Judge John L. Murphy, Jr. deferred a decision on appointing a new receiver. However, he granted an order, sought by the Attorney General, requiring Huggins and the Hospital to obtain a new administrator, medical director, and director of nurses. Judge Murphy also ordered the receiver and the Hospital to take the following steps:

— Immediately render basic care to all patients including hygiene, bathing, and clean clothing to each resident.
— Ensure that physicians assess each patient for current medical needs.
— Ensure that independent nurse consultants perform skin assessments on all residents.
— Ensure that a nutritionist assess all patients on tube feeding to determine their nutritional status.
— Ensure that registered dieticians assess all patients for nutritional status.
— Ensure that each supervisor/charge nurse makes daily rounds of patient units.
— Take all necessary steps to implement an infection control program.
— Clean the facility, including all patient areas and patient equipment, and take all necessary steps to eliminate roaches, rodents, and rodent droppings.

Huggins was also directed to phone DPH twice weekly and to file weekly reports with the court, the Attorney General and DPH.

The SJC issued decisions on two Charities Division cases. In these companion cases, the Division sought to establish that the *Weymouth Agricultural Society* and the *Brockton Agricultural Society* were charitable organizations. Both are nonprofit, stock corporations which operate popular agricultural fairs.

The SJC held that the two corporations were not charitable because the corporate charters and bylaws did not affirmatively bar stockholders from selling their stock back to the corporations at a profit, or from receiving a share of assets upon dissolution. The court said such restrictions would be necessary for a finding of charitable status for nonprofit, stock corporations with programs which are not inherently charitable.

Nonetheless, the Court adopted much of the Attorney General's legal position. The Court agreed with the Attorney General that encouraging agriculture could be charitable if conducted by an entity benefitting the indefinite public; and issuance of stock is not *per se* determinative of a corporation's non-charitable status. Finally, the court agreed that each of the following factors urged by the fairs as probative of non-charitable status are irrelevant: incorporation or property tax exemption under statutes other than those denominated as applying to "charities"; federal tax exemption status other than as a charity; the lack of receipt of gifts, or the degree to which gifts have been donated by the corporation; recent beliefs of a corporation's stockholders, officers or directors as to non-charitable status; and the extent to which a corporation has not availed itself of benefits enjoyed by charities, such as charitable immunity, or exemption from sales or unemployment compensation taxes.

The SJC decision also strengthened and clarified the scope of the Attorney General's jurisdiction to enforce the due application of charitable funds and prevent breaches of trust. The Court adopted the Attorney General's argument that under M.G.L. c.12, §8, the division has jurisdiction over entities traditionally incorporated as charities, and non-charities which hold any portion of their assets in charitable trust, such as those soliciting funds for charitable purposes.

The Supreme Judicial Court Single Justice approved the modification of trust terms requested by the *Trustees Under The Will Of Caroline Weld Fuller* and the

Attorney General. As a result, a small under-utilized home for elderly women will be permitted to expand to a continuing care facility. Residence will no longer be restricted to "white, American women of the Protestant faith," and the trustees will be required to give preference to applicants of limited means, and to seek and utilize governmental funding to support lower income residents.

The Attorney General obtained a judgment by consent against the *American Postal Workers Union* on July 9, 1987. The judgment contains the first solicitation ban ever obtained against a Massachusetts charity. The American Postal Workers Union was barred from soliciting contributions in Massachusetts until March 1988.

The complaint filed in October 1986 alleged that the union engaged in deceptive solicitation tactics in conjunction with its solicitor, Capricorn Publishing Company. The Attorney General alleged that the Union solicited charitable contributions in 1985 and 1986 ostensibly for granting the last wishes of terminally ill children when it actually paid the costs of the union's annual convention. In addition, more than 80% of the money raised went to the professional solicitors as expenses and commissions. The solicitor is under a preliminary injunction in a separate action which is still pending. The union also paid $12,500.00 to the Commonwealth.

In *Attorney General v. Bradley M. Taber*, a Final Judgment was obtained on December 21, 1987 against a professional solicitor, Bradley M. Taber, in a case involving violations of M.G.L. c.68, the Charitable Solicitation Act.

In the complaint filed in 1986, the Attorney General alleged that the defendant had failed to comply with the disclosure provisions of c.68 while engaging in a fund-raising campaign in Southeastern Massachusetts on behalf of the Coalition of Vietnam Veterans (C.O.V.V.), a charitable organization based in New Bedford. In addition to failing to disclose his status as a solicitor and detail how the money would be used, the defendant also engaged in affirmative misrepresentations by telling donors that the was a member of the C.O.V.V., rather than a solicitor, and by saying that all the money raised would go to the C.O.V.V. In fact, only 20% was actually to be given to the organization under the contract signed with Taber.

The final judgment prohibits Taber from engaging in any solicitation in Massachusetts unless and until he complies with the registration, filing and disclosure provisions of c.68. Taber was also ordered to pay a civil penalty of $10,000 for his past violations of the statute, and to account to the Attorney General for all money, previously raised for charity. In addition, money held in an account in Taber's name, attached when the case was filed, was ordered released to C.O.V.V.

The case of *Attorney General v. Telco Communications, Inc.* involved a First Amendment challenge by a solicitation firm to Section 21 of the Massachusetts Charitable Solicitation Act. Section 21 prohibited professional solicitors from charging fees which exceeded 25% of the gross proceeds raised, excluding the cost of performances, events, or goods sold to the public. There was oral argument on June 2, 1987 in the First Circuit Court of Appeals, and on July 31, the court declared the section unconstitutional as a violation of charities' freedom of speech and affirmed the District Court's decision. At the end of the year, the U.S. Supreme Court reached the same conclusion about a similar North Carolina statute.

## UTILITIES

By statute, the Attorney General is the designated representative of Massachusetts ratepayers in utility rate matters. The Utilities Division is the primary, and in most instances, the only representative of the consumer interest in gas, electric, and telephone rate cases and related matters within Massachusetts.

The rate cases in which the Attorney General appears are heard and decided by the Department of Public Utilities (DPU). The Division also appears on behalf of Massachusetts ratepayers before the Federal Energy Regulatory Commission (FERC). This federal intervention is essential since FERC establishes nearly all of the purchase power rates charged to four of the eight retail electric companies serving customers in the Commonwealth. FERC also has wholesale rate jurisdiction over the Massachusetts utility investment in Seabrook, with the exception of MMWEC.

During fiscal year 1988 the Utilities Division continued aggressive litigation including cases that follow.

*Seabrook Litigation before DPU and FERC*

This office reached two settlements concerning the rate treatment of Seabrook Unit 2. The first settlement was reached with *Canal Electric*, and various other parties at the FERC. The second settlement was reached with *Cambridge Electric and Commonwealth Electric* at DPU. The first settlement concerns the amount of Canal's investment in the cancelled Seabrook Unit 2 which will be charged under wholesale rates by Canal to Cambridge and Commonwealth. The second case involves the amount of the payments to Canal by Cambridge and Commonwealth which can be charged through retail rates. The settlements have been filed with the two agencies.

As originally proposed, Canal would have recovered approximately $28 million (a 7% increase in wholesale revenues) in three years from Cambridge and Commonwealth Electric which would have passed the increase along to retail customers. Under the FERC settlement, Canal will collect only 90% of its investment in Seabrook Unit 2 over approximately 10 years rather than 100% over three years. As a result of the FERC Settlement, retail ratepayers will receive a refund of about $7-million representing over collections to date by Canal Electric Company for its Seabrook 2 investment.

The Attorney General reached a stipulated settlement of the rates of *New England Power Company* and resolved the rate treatment of the Company's investment in Seabrook Unit 1. In a settlement filed for approval at the FERC, the Attorney General, NEP and other parties agreed that NEP could not recover from its ratepayers 53% of its $543 million investment in Seabrook if the plant is cancelled. It will be unable to recover approximately 30% of its investment if the plant ever operates. The Company will also stop collecting carrying charges on its investment and instead will use customer payments to discharge their share of the Company's investment in Seabrook. The settlement ends almost two years of litigation before FERC.

*MMWEC* filed a request at the DPU seeking approval for additional financing of its investment in Seabrook. The Attorney General intervened to represent ratepayers and will oppose this financing request. MMWEC subsequently announced its intention to stop making Seabrook payments and sell its share of the plant. A DPU hearing on MMWEC's request had not commenced at the end of the fiscal year.

*Retail Rate Cases and Other Regulatory Matters Before The DPU*

The Attorney General finished the administrative trial and submitted briefs urging the DPU to reduce *New England Telephone Company* (Phase 2) rates by $159 million or about 10%. We also argued that NET was unfairly charging monopoly residential and small business ratepayers excessive costs for a "gold plated" network designed to defeat the future competition for large business customers, and the costs of unregulated NYNEX affiliates. We urged the DPU to investigate these two areas in more detail.

After trial, the Attorney General, NET and certain other parties to this case reached agreement on a stipulated settlement of the case. The stipulation was filed at the DPU for approval. It provides for a 50¢ reduction in monthly residential rates, a three-year freeze on those and certain business rates, the enrollment of NET into several programs to benefit low income consumers, and funding for the Attorney General to investigate NET's affiliate relationship and its construction budget. The stipulated settlement had not been acted on by the DPU at fiscal year end.

The Attorney General filed a petition in August on behalf of himself and Sharon Pollard, Secretary of Energy in the Commonwealth, *asking the DPU to investigate Massachusetts utilities' apparent failure to have sufficient capacity available to meet summer 1987 peak demands for electricity.* The Attorney General filed testimony of three state energy officials. After 12 days of hearings, briefs were filed. The Attorney General asked the DPU to find that poor utility planning and an unreasonable reliance on Seabrook 1 and Pilgrim units that summer caused the shortages and to order appropriate remedies. The DPU subsequently found that the power planning engaged by NEPOOL was deficient and resulted in the shortages. At fiscal year end, the case was still pending.

The City of Boston filed a petition asking the DPU to reduce *Boston Gas rates.* The Company then requested a $15 million increase in rates. The City subsequently withdrew from the case. The Attorney General intervened to represent consumers hoping to achieve a significant rate reduction. At fiscal year end this case was still before the D.P.U.

The Attorney General filed Comments in August 1987 with the DPU asking that it not deregulate the generation of electricity by adopting a bidding system or other *automatic ratemaking formula.* The Attorney General also urged the DPU to expand this investigation to include conservation measures as a means of least-cost supply planning. The DPU accepted this and called for further comments to be filed by December 4.

The Attorney General testified before the DPU on the concept of least cost integrated planning and urged it to adopt rules implementing such a requirement for all electric utilities.

The DPU subsequently issued an order proposing a bidding system to govern cost recovery of power plant investment over the Attorney General's objections. The DPU has not taken action on the conservation phase of this case.

Proceedings began before the DPU concerning the revenue requirement and rate design of *Cambridge Electric Light Company's* rates. The Company proposed increasing the customer charge for residential users by 106% and for residential heating customers by 84%.

The Attorney General and the Company stipulated to a $300,000 reduction in the Company's revenue requirement, which the DPU accepted. In addition, the Attorney General filed his initial brief in the rate design portion of the case which was not settled, seeking to limit the increase proposed for residential customers

and to establish rates that support conservation.

The DPU issued an order that moderated residential customer charge increases to 55% for non-heating customers and 70% for heating customers, and extended the 35% SSI discount to residential heating customers. The DPU also ordered the Company to file within 120 days a detailed plan for meeting demand that includes conservation efforts.

On Dec. 17, *Western Massachusetts Electric Company* (WMECo) filed its petition for a $24 million or 9% rate increase. Most of the rate request is to implement a 1986 DPU decision to phase Millstone 3 into the rate base over five years. The Company's rate design proposed an above-average increase at 11% to residential customers. After the Attorney General cross examined Company witnesses and filed a brief in this case, the DPU ordered the Company to raise rates by only $8 million, or 33% of its original request. The DPU did not adopt the Attorney General's proposed rate design but indicated that it might do so in subsequent cases.

*Richmond Telephone Company* sought its first general rate increase in over 20 years. The proposal to increase monthly rates by more than $13 would have more than doubled the residential rates. The Attorney General intervened in this case before the DPU and reached a settlement with the Company. The DPU approved the settlement, which prevented the local monthly rate from rising above $9 per month.

In its annual review of the operating performance of *Boston Edison Company's* fossil-fueled generating plants, the DPU found that 700 hours of outages experienced between November 1, 1986 and October 31, 1987 were the direct result of imprudent actions by the Company. These findings of imprudence do not include the outage hours for plants in which Boston Edison has entitlements. Those have not yet been determined.

The Department also ordered the Company to provide unit-by-unit heat rates, and put the Company on notice that the Department would review the performance goals set for Boston Edison's peaking units. Additionally, the Department noted that in future performance reviews it would carefully review Boston Edison's efforts to improve the performance of its fossil-fueled plants.

Finally, the Department found BECo's citing of Pilgrim costs as a justification for deferring investments in its fossil-fueled plants "disturbing." The Department noted that limited capital should constitute only a "short term problem" for BECo, and expected BECo to make every effort to procure the financing necessary to proceed with all capital projects identified as cost-effective and in the best interest of ratepayers.

The *Pilgrim Nuclear Power Plant* has been out of operation for more than two years. Since the plant was shut down in April 1986, Boston Edison, Pilgrim's owner and operator, has incurred approximately $250,000 a day in costs to buy power to replace that generated by Pilgrim. The issue in this case centers on responsibility—to what extent the initial shutdown and length of the outage was the result of imprudent actions by Boston Edison and, consequently, how much of the replacement power costs should be paid by Company shareholders and how much should be charged to ratepayers.

The plant has still not been granted permission to restart by the NRC. Hearings are expected to begin in the Fall and continue throughout FY '89.

On June 16, 1987, *Commonwealth Gas Company* filed proposed rates with the DPU designed to generate an additional $15.7 million or 7.1% in annual revenues over rates in effect on June 30, 1987. The Company requested a return on equity

of 14.5 to 15.2%. Commonwealth also proposed new class rate designs for all rate classes which embodied significant increases for residential customers. Commonwealth also proposed a firm gas transportation tariff. The DPU suspended the proposed rates until January 1, 1988, and set the requests for hearing.

On December 31, 1987, after a month of hearings, the DPU granted Commonwealth an increase of $12.5 million over rates in effect as of June 30, 1987 based on an allowed return on equity of 13.25%. The Attorney General had recommended an overall increase of about $6 million based on a return on common equity of 11.5%. The DPU also adopted rate designs yielding increases for the residential non-heat and residential heating classes of 26% and 12% respectively. The Attorney General had recommended increases at about half that level. The DPU accepted the Attorney General's arguments on marginal cost which will serve to give more appropriate price signals to customers.

The proposed firm gas transportation tariff is still pending in DPU (87-122A).

This proceeding involved applications by *Cambridge Electric Light Company and Commonwealth Electric Light Company* to recover under G.L. Ch. 164, Sec. 94G for fuel and purchased power charges. The Attorney General argued that consistent with precedent the DPU should impute Boston Edison Company's imprudence resulting in outages of Pilgrim 1 during January and February 1985 to Commonwealth Electric Company and order refunds and interest of approximately $683,000. That total represents excess replacement power costs incurred (and already charged to customers) by Commonwealth as a result of the outages. The Attorney General also argued the DPU should impute to Commonwealth and to Cambridge any imprudence of Canal Electric Company (an affiliated company) with respect to an extended outage at Canal Unit 1 during the Fall of 1986. The hearings occurred in March and April 1988. The DPU has not issued a decision.

*Boston Edison Company* sought authorization to issue $200 million of long term securities. We intervened to determine how much of the capital additions request related to the Pilgrim Nuclear Plant and to participate if the DPU decided to assess the economics of Pilgrim or the prudence of additional investments. The DPU decided not to decide those issues here, and approved BECo's request.

*New England Telephone* (NET) sought DPU permission to offer a switched virtual private network service (V—PATH Custom Network System) which would permit its large private line customers to obtain better service, usually at a lower price. NET claimed that this service was competitive because it was similar to a service offered by its competition and therefore, should be regulated with less scrutiny than other services. We intervened opposing this special deal for large business customers because eventually residential ratepayers would have to make up the lost revenue. The DPU agreed that because the proposal bundled competitive and monopoly services in one package, the package was anti-competitive and should be rejected.

The Division was involved in reviewing the merits of New England Telephone's request for legislation to permit it to charge residential customers for directory assistance and in developing the Attorney General's oposition to this bill.

## NUCLEAR SAFETY

The Nuclear Safety Unit litigates, on behalf of the Commonwealth, emergency planning, safety and management matters for nuclear power plants in and around Massachusetts. In Fiscal 1988, the Unit has been involved in litigation on the

Seabrook Station in Seabrook, N.H., the Pilgrim Station in Plymouth, and Vermont Yankee Station in Vernon, Vt.

The *Seabrook litigation*, in which the Attorney General's office has been involved for 14 years, is the single largest piece of litigation in the office. Separate proceedings are currently ongoing in the United States Nuclear Regulatory Commission (NRC) on low-power and full-power issues, First Circuit Court of Appeals in Boston, and the Federal Bankruptcy Court in New Hampshire.

The Unit has been heavily involved in attempting to persuade the NRC not to permit low-power testing. The testing represents an environmentally and financially significant point for the plant because, if permitted, it will irradiate and contaminate the plant for the first time. On February 3, 1988, the Unit persuaded the NRC's Appeal Board to reopen the previously closed low-power proceeding record to litigate the viability of the Applicants' new mobile and airborne siren alerting system for the Massachusetts Emergency Planning Zone. The previous fixed siren system had been removed after the First Circuit found that the applicants did not have the legal authority to erect it in the first place. The Appeal Board ruled that the siren litigation must be resolved favorably to the applicants before low-power testing can begin.

On July 5, 1988, the Appeal Board ruled favorably on Massachusetts' petition to waive the NRC's rule which generally finds utilities financially qualified to operate nuclear power plants and to require an individualized determination in this case. The Unit had urged the Appeal Board to waive the rule because of New Hampshire's anti-CWIP statute, the bankruptcy of Seabrook's lead owner, Public Service Company of New Hampshire (PSNH), and the decision of another owner, the Massachusetts Municipal Wholesale Electric Company (MMWEC), to remove itself from Seabrook. The matter is now pending before the full Commission.

Separate proceedings before the NRC are now taking place concerning the New Hampshire emergency response plan, the utility's emergency response plans for Massachusetts, and the June 28-29, 1988 joint exercise of those two sets of plans. Hearings on the New Hampshire plans began on October 5, 1987 in Concord, N.H. and were not completed until June, 1988. The hearings addressed the adequacy of the plans in terms of such issues as evacuation time estimates, communications, resources, human behavior and sheltering. A decision is expected this Fall.

Similar proceedings have begun on the utility's Massachusetts plan and the performance of the exercise. Discovery is to be completed in mid-November and hearings will likely begin in the Spring of 1989. Hearings on the utility plans are likely to be even more complicated than those for the New Hampshire plan because of the presence of questions about the legality of state officials delegating to utility workers the authority to carry out the utility plans.

In November, 1987, the NRC amended its emergency planning rules to facilitate review and evaluation of utility plans. Massachusetts, New York, and several environmental groups appealed the amendments to the First Circuit as an arbitrary and capricious attempt to push through the regulatory process the licensing of Seabrook and Shoreham Station on Long Island. The Attorney General argued for Massachusetts and the decision is now under advisement.

On January 28, 1988, PSNH filed for protection under Chapter 11 of the Bankruptcy Code. PSNH is the first investor-owned public utility to make such a filing in more than 50 years. Because the fate of Seabrook is a central issue in the bankruptcy, the office filed an appearance with the bankruptcy court. On May 12, 1988, in response to the NRC's presentation to the bankruptcy court of its views on the

licensing, we filed a document outlining the past and expected future course of the proceedings.

*Pilgrim Station* has been shut down since April 1986 because of numerous problems with the management and physical state of the plant. Until that time, Pilgrim had widely been viewed as one of the worst run nuclear plants in the country.

In August, 1987, the Federal Emergency Management Agency found that the state of emergency planning and preparedness for an accident at Pilgrim is inadequate.

On July 15, 1986, MassPIRG and other parties filed a petition with the NRC requesting that it issue an order to show cause why Pilgrim should not remain closed or have its operating license suspended until it remedied plant management deficiencies, design flaws in the plant's containment structure and emergency planning problems. The NRC denied the petition and the petitioners, who then, joined by this office, appealed to the First Circuit. On July 15, 1988, the court affirmed the NRC's ruling, holding that the ruling is not subject to judicial review.

In October, 1987, our office filed another, similar petition raising issues which arose after the MassPIRG petition. On June, 1988, the NRC denied the petition with respect to design deficiencies but deferred its ruling with respect to management and emergency planning issues.

The NRC conducted a two-week inspection of the plant in August 1988 to determine whether the management and design issues had been resolved. A report on the inspection, in which a consultant to our office and the Massachusetts Department of Public Safety is participating, is expected in the Fall of 1988.

In April, 1986, the *Vermont Yankee* submitted a proposed license amendment to the NRC to authorize an increase in the capacity of the existing spent fuel pool from 2000 to 2870 fuel assemblies. Because the change would increase the potential consequences of certain types of severe accidents, the Unit intervened in the proceedings along with the state of Vermont and the New England Coalition Against Nuclear Pollution. We have asked the NRC not to permit the increase, until the case is completed.

## SPECIAL LITIGATION

In a Chapter 11 bankruptcy proceeding, the Commonwealth filed a $122 million dollar claim in 1983 against *Johns-Mansville* for the cost of removing, repairing and otherwise managing the *asbestos-containing products* the company manufactured. Those products are present in a large number of more than 5,000 state buildings.

The Attorney General continues to represent the Commonwealth's claim and serves as Chair and Chief Negotiator for the State Government Creditors Committee, a group of 35 Attorneys General whose states filed claims in excess of $5 billion dollars. The Department played a key role in negotiations with Manville, other property damage creditors, additional creditors, and the representative of future health claimants. The Department and others negotiated the establishment of a property damage settlement trust and prepared a draft of the standards to be used by the Trust for payment of property damage claims. After a trial before a panel of three jurists, the panelists issued standards very similar to those originally proposed by the claimants. The standards will govern the payment of all property damage claims filed against Manville in the Chapter 11.

The Department continues to participate in the bankruptcy proceeding and meets

regularly with the Property Damage Settlement Trusts trustees and executive director. The Department also assists in the development of claims proceeding procedures and claim forms, monitors the insurance settlements, and participates in the appeals of the Order confirming the Plan of Reorganization.

On December 30, 1986, the Commonwealth filed a claim in the *UNR Inc. Chapter 11 bankruptcy* proceeding in the U.S. Bankruptcy Court for the Northern District of Illinois, Eastern Division. UNR was a former manufacturer of asbestos products which were used in construction. The Commonwealth's claim is for expenses actually incurred and expenses expected to be incurred in the abatement, including removal, repair and replacement, of all asbestos production in the Commonwealth's public buildings. The claim seeks the portion of $396,000, the Commonwealth's total asbestos related claim, which is determined to be UNR's actual liability. Discovery of the debtor, UNR Inc., is proceeding on a coordinated basis with other states which filed similar claims.

On August 25, 1987, the Department testified at a public hearing held by the *Environmental Protection Agency* in Washington, D.C. on its proposed rule on *Asbestos-Containing Materials in Schools*. The proposed rule was issued pursuant to the *Asbestos Hazard Emergency Response Act of 1986 (AHERA)*. The Department represented a committee of 35 Attorneys General who have been working jointly on asbestos related issues, and urged EPA to make several changes before issuing its final rule. Those changes would strengthen the rule to further protect human health and the environment as required under AHERA. In its proposed rule, EPA had placed cost on an equal footing with protection of human health and the environment. In addition to its testimony, the Commonwealth filed extensive comments on the rule. The Commonwealth and other states intervened in an appeal of the AHERA regulations filed by certain former asbestos manufacturers. The United States Court of Appeals for the District of Columbia Circuit adopted EPA's and the state intervenors' position and upheld the AHERA regulations.

In *City of Boston v. Keene*, filed by the City against 56 former manufacturers of asbestos products, the defendants challenged Chapter 260, §2D. Chapter 260, §2D is a special statute of limitations for asbestos property damage claims which was originally drafted and filed by the Department. Defendant manufacturers challenged the statute on several constitutional grounds. The department intervened in the case for purposes of defending the challenged statute. On February 26, 1988, Judge Morse issued a decision upholding the constitutionality of the statute.

## GOVERNMENT BUREAU

The Government Bureau has three functions: (1) defense of lawsuits against state officials and agencies concerning the legality of governmental operations; (2) initiation of affirmative litigation on behalf of state agencies and the Commonwealth; and (3) legal review of all newly-enacted municipal by-laws, pursuant to G.L. c.40, 32.

A report of significant activity during fiscal year 1988 follows.

*Litigation*. The Government Bureau defends the Commonwealth and its officials and agencies in litigation in state and federal courts, and, in certain cases, before federal administrative agencies. These proceedings typically involve challenges to the validity of governmental decisions, initiatives, regulations, or statutes, and raise important issues of administrative and constitutional law in diverse subject-matter areas.

During Fiscal Year 1988, the Bureau opened 552 new cases, and closed 533 cases. In addition, the Bureau supervised and monitored the defense of 86 welfare benefits cases by the Department of Public Welfare. Cases argued by Government Bureau attorneys resulted in one U.S. Supreme Court decision, 17 decisions by the Supreme Judicial Court, 19 by the Appeals Court, five by the U.S. Court of Appeals, and 13 by the U.S. District Court.

The U.S. Supreme Court affirmed last year's decision in *Commonwealth v Bowen* that the state is entitled to $11.4 million in Medicaid reimbursements from the federal government. The court also reversed the First Circuit's ruling that the state must file a new suit in the U.S. Court of Claims in order to collect.

In *Hyde Park Enterprises v. Connolly*, the First Circuit Court of Appeals affirmed a preliminary injunction enjoining enforcement of Section 3 of the state anti-takeover statute and opined that it was probably preempted by federal law, thus bringing to an end a series of takeover cases.

In *Beth Israel Hospital Association v. Board of Registration in Medicine*, a case in which Attorney General Shannon personally appeared, the Supreme Judicial Court upheld regulations providing important new safeguards against medical malpractice. In *Gardner-Athol Mental Health Association v. Zoning Board of Appeals*, the Court sustained our contention that group homes in which the mentally disabled learn "activities of daily living" are exempt from local zoning restrictions. In *Nigro v. Attorney General*, the Court rejected a challenge to the Attorney General's certification of an initiative petition. In *Coalition for the Homeless v. Dukakis*, the Court ruled that the statutory obligation to provide aid to AFDC recipients is limited by the funds appropriated by the General Court, but the Welfare Department has a duty to notify the Legislature of a shortfall. In *Barlow v. Wareham*, the SJC upheld the validity of a local by-law, approved by the Attorney General, which restricted commercial shellfish harvesting to town residents or taxpayers. The SJC upheld state taxation of *Tenneco, Inc.*, as a utility, notwithholding the diverse other activities of the corporation's subsidiaries.

Professional discipline cases continued to occupy a good deal of the Bureau's time, including *Cherubino v. Board of Registration of Chiropractors, Friedman v. Board of Registration in Medicine, Bougioukas v. Board of Professional Engineers.*

The Commonwealth's regulatory initiatives were upheld in a number of cases. *Worcester Sand & Gravel v. Board of Fire Prevention* upheld a limitation on blasting within a certain distance of a microelectric plant. In *Processed Apple Institute v. Department of Public Health*, the Court confirmed the state's power to establish more stringent tolerance levels for pesticide residues than allowed by federal law. Rate Setting Commission regulations and decisions limiting hospital and nursing home costs were upheld in a series of cases in the Appeals Court and the SJC.

Automobile insurance litigation drew heavily on Bureau resources as insurance companies challenged the constitutionality of the state's "reinsurance" system for high risk drivers, the restrictions on ceasing business, and the level of authorized rates.

The docket of Alcoholic Beverages Control Commission (ABCC) cases lengthened as the Commission's efforts to curb drunk driving brought about more license suspensions. The Commission also stepped up its regulation of liquor wholesalers.

In *EEOC v. Commonwealth*, the U.S. District Court agreed with the SJC's decision in *Apkin v. Commonwealth* that the state constitutional provision mandating

judicial retirement at age 70 is not preempted by federal law. The EEOC is appealing. In *Dukakis v. U.S. Department of Defense*, the court rejected the Commonwealth's claim that it was entitled to withhold consent from National Guard training in Honduras. We are appealing. The court struck down the legislative plan for redistricting the state House of Representatives as violative of the "one person, one vote" right, but approved a new plan which cured this defect.

We settled the Boston Harbor case by an agreement creating a $2 million Boston Harbor-Massachusetts Bay Environment Trust Fund and agreeing to pay a $425,000 penalty to the U.S. Treasury. The court granted our request for a nationwide injunction against enforcing new federal regulations severely curtailing free speech and choice in family planning programs supported even partially by federal funds. The U.S. Department of Health and Human Services is appealing. A federal sex discrimination suit against the Department of Correction was settled.

A major settlement was achieved in a suit brought against Worcester State Hospital by the U.S. Department of Justice.

Mandatory retirement for MDC police officers and age limitations for applicants to be Motor Vehicle Registry officers were upheld, but both decisions are being appealed. Stipulations dismissing with prejudice three Equal Employment Opportunity Commission (EEOC) cases challenging the Massachusetts statute which requires municipal police and firefighters to retire at age 65 were entered in the U.S. District Court.

*By-Laws.* Town by-laws, home rule charters, and amendments thereto are reviewed and must be approved by the Attorney General before becoming effective. The review function is performed by attorneys in the Government Bureau. During the fiscal year, the By-Laws Division reviewed 2,146 by-laws (a 33% increase over last year) and 10 home rule charter actions from more than 300 towns. There were 113 disapprovals or disapprovals in part, making an error rate of five percent for the submittals involved.

The by-laws received this year consisted of 838 general by-laws and 1,308 zoning by-laws. General by-laws pertain to town government and the exercise of municipal power. The zoning by-laws are a continuing exercise of the police power over land use. Zoning by-laws generate the most local controversy since they affect what the land owner considers as his constitutional right to own, use and enjoy property.

Significant by-laws reviewed this year included a condominium conversion by-law linking condominium development to construction of low and moderate-income housing, various measures to prevent accidental discharges of toxic, combustible and hazardous materials, and numerous by-laws to control pit bull terriers.

As part of an effort to enable the Attorney General to serve a more active and effective role in the field of municipal law, the former By-Laws Division was expanded into a Municipal Law Unit during Fiscal Year 1988. Working in conjunction with the Massachusetts Town Clerks Association, the unit's staff streamlined the procedures to be followed by town clerks in submitting proposed by-laws to the Attorney General for approval. A computer data base is also being developed to docket and index all town by-laws. In addition, Division attorneys filed an *amicus* brief in the Supreme Judicial Court in *Canner v. Town of Groton*, on behalf of 30 local electric ratepayers seeking to enforce two town by-laws which require town meeting approval before the town could make certain investments in electric generating projects.

# EXECUTIVE BUREAU

The Executive Bureau is charged with the overall administration and policy of the Attorney General's office. In addition, the Bureau handles a number of specialized functions, including constituent relations, legislative affairs, and opinions.

## LEGISLATION

The Legislative Affairs Office is responsible for coordinating the Attorney General's position on state and federal legislation. The staff serves as the liaison to the Massachusetts legislature and other elected officials and is repsonsible for overseeing all legislation sponsored by the Attorney General.

During fiscal year 1988, the Attorney General filed 22 bills, one of which was signed into law before the summer recess—the Child Sexual Exploitation Bill, prohibiting the production and dissemination of child pornography.

Twelve of the bills have begun to be considered in various stages by the Legislature including: 1) an act to establish the Massachusetts Corrupt Organization Statute; 2) an act revising the penalties for violation of certain environmental laws; 3) an act making it unlawful to falsely report a fire, or to threaten to burn or destroy a place of worship; 4) an act to clarify the requirements relating to condominium conversions; 5) an act to allow appropriate use of investigatory materials in court; and 6) an act to control certain precursor chemicals.

The Division actively monitored the progress of approximately 100 bills, and became actively involved in 20 through meetings, letters, and testimony. The Division also monitored the activities of the committees as well as the floor action of the House and Senate.

## ELECTIONS DIVISION

The major responsibility of the Elections Division is to *provide legal representation to the Secretary of State and the State Ballot Law Commission regarding election related issues.*

One significant case involved a challenge to the state's decennial census for the city of Boston and the Legislature's 1987 House redistricting plan. The suit, (*Black Political Task Force, et al. v. Connolly, et al and Massachusetts Republican State Committee, et al. v. Connolly, et al.*), brought by several minority groups in the city of Boston and the Massachusetts Republican State Committee, claimed that the population figures determined and verified by the State Decennial Census Commission and used for legislative reapportionment were invalid and therby violated "one person, one vote."

The plaintiffs further alleged that the 1987 reapportionment of the Massachusetts House of Representatives exceeded constitutionally mandated population deviations. A three-judge federal court determined that the state census for the city of Boston was valid. However, the court found that the population deviations in the House redistricting plan exceeded constitutional limits.

In another case, *Shannon et al. v. Plum Island Water Commission, et al.*, the Division successfully brought an action against the Commission. In a rare action in *quo warranto*, the court invalidated the election of several water commissioners because only taxpayers rather than registered voters were allowed to participate

in the election. The court also found violations concerning other aspects of the election. A new election was ordered.

The Elections Division successfully defended several decisions by the State Ballot Law Commission concerning the proper issuance of certificates of registration by local clerks and the residency qualifications of candidates.

In August of 1987, 21 *initiative petitions* were filed *proposing various laws to be submitted to voters on the November 1988 ballot.* Fifteen were certified as appropriate for submission to the people.

Two separate lawsuits challenging the Attorney General's certification were initiated in the Supreme Judicial Court. The first case, *Nigro v. Attorney General*, involved a claim that the Attorney General's certification was erroneous because the title of the petition was inappropriate. In the second case, *Yankee Atomic v. Secretary of State*, the plaintiffs contended that the certified initiative was beyond the scope of Article 48 because it was inconsistent with the right to receive compensation for private property appropriated to public use.

In both cases, the Supreme Judicial Court agreed with the Attorney General and affirmed his certification determination.

The Elections Division is responsible for *enforcing compliance with the state's campaign finance law by candidates and political committees.* (M.G.L. c. 55)

In a major case brought under the state's campaign finance laws, the Attorney General initiated a civil action against a sitting state senator claiming that he and his political committee made political expenditures in violation of campaign finance laws. A judgment required the senator to pay $10,000 as a civil forfeiture and repay his committee for all inappropriate expenditures which totaled approximately $5,500.

The Office of Campaign and Political Finance cited 187 individual candidates or treasurers of political committees who failed to file the required financial disclosure reports. As a result of administrative action by the Division, 75 reports were subsequently filed.

The Elections Division brought civil actions against the remaining 112 candidates or treasurers, with the court issuing orders requiring the filing of financial reports.

The Elections Division is also responsible for enforcing state statutes that *require legislative agents (lobbyists) and their employers to file financial disclosure statements with the Office of the Secretary of State.* (M.G.L. c.3 s. 43,44,47) In fiscal year 1988, six violations of these sections were reported by the Secretary of State to the Attorney General. As a result of the action taken by the Elections Division, all reports have been filed with the State Secretary.

The Division *assists the State Jury Commissioner* in his efforts to have cities and towns submit census lists in a timely manner so that the jury selection process can be carried out effectively. With the assistance of the Elections Division, all cities and towns filed their respective reports without the need to seek court action.

## WESTERN MASSACHUSETTS

The Western Massachusetts Division of the Department of the Attorney General is *responsible for legal matters in the four western counties* of Berkshire, Franklin, Hampden and Hampshire. The Western Division, located in Sprinfield, is staffed by investigators and attorneys. During fiscal 1988, the Division was responsible for more than 600 cases.

The Division litigates a wide range of cases, including tort, contract, eminent

domain, worker's compensation, environmental, consumer protection, civil rights, administrative appeals, and victims of violent crimes. The Division also prosecutes fraud cases for the Division of Employment Security.

Similarly, the investigators are responsible for a number of cases. In addition to investigating consumer fraud, investigators work closely with attorneys in developing their cases by interviewing witnesses, reviewing documents and accumulating and compiling potential evidence.

The Division also handles consumer complaints and attempts to resolve them short of court action.

### PUBLIC RECORDS, FAIR INFORMATION PRACTICES, OPEN MEETING LAW

During fiscal 1988, the responsibility for enforcing the Public Records Law, the Fair Information Practices Act, and the Open Meeting Law was transfered from the Civil Rights Division to the Executive Bureau.

Enforcement of these three laws represents most of the work done by this Department in the area of public disclosure. Many complaints and inquiries filed with the Department concerning these laws were resolved without litigation.

## OPINIONS

The Attorney General is authorized by M.G.L. c.12, s. 3, 6, and 9 to render legal advice and opinions to constitutional officers, agencies and departments, district attorneys, and branches of the Legislature. Opinions are given primarily to the heads of state agencies and departments.

The questions considered in legal opinions must have an immediate, concrete relation to the official duties of the state agency or officers requesting the opinion. In other words, hypothetical or abstract questions, or questions which ask generally about the meaning of a particular statute, lacking a factual underpinning, are not answered.

Opinions are not offered on questions raising legal issues which are the subject of litigation or that concern collective bargaining. Questions relating to the wisdom of legislation or administrative or executive policies are not addressed. Generally, federal statutes are not considered and the constitutionality of state or federal legislation is not determined.

Opinion requests from state agencies which report to a cabinet or executive office must first be sent to the appropriate executive secretary for his/her consideration. If the secretary believes the question raised is one which requires resolution by the Attorney General, the secretary then requests the opinion.

There are two reasons for this rule. The first concerns efficiency. Opinions of the Attorney General, because of their precedential effect, are thoroughly researched and prepared. If a question can be satisfactorily resolved more quickly within the agency or executive office—by agency legal counsel or otherwise—everyone is better served. The second reason relates to the internal workings of the requesting agency and its executive office. It would be inappropriate for this Department to be placed in the midst of an administrative or legal dispute between these two entities. These rules help to ensure that the agency and its executive office speak with one voice insofar as Opinions of the Attorney General are concerned.

If the agency or executive office requesting an opinion has a legal counsel, counsel should prepare a written memorandum explaining the agency's position on the legal question presented and the basis for it. The memorandum should accompany the request. When an agency request raises questions of direct concern to other agencies, governmental entities, or private individuals or organizations, the Opinion Division solicits the views of such interested parties before rendering an opinion.

The issuance of informal opinions is strongly discouraged. Informal Opinions of the Attorney General are often relied upon as if they were formal Opinions. In a number of instances, this reliance has been seriously misplaced. As a result, the issuance of informal opinions is strictly limited to situations of absolute necessity. It is made explicit that the informal opinions cannot be relied upon as if they were formal Opinions.

Between July 1, 1987 and June 30, 1988, three formal Opinions of the Attorney General were issued with an additional 110 requests considered, evaluated, and declined.

The formal Opinions follow.

December 21, 1987

Robert Q. Crane, Chairman
State Board of Retirement
One Ashburton Place - Rm. 1219
Boston, Massachusetts 02108

Dear Chairman Crane:

In your capacity as chairman of the State Board of Retirement, you have requested my opinion as to whether the Board is required to pay an annual benefit to widowers under G.L. c.32 §101. The statute provides benefits to widows of disabled employees, but does not expressly provide benefits to widowers.[1] For the reasons set forth below, it is my opinion that the correct interpretation of G.L. c.32, §101 requires the State Board of Retirement to pay the annual benefit provided by that statute to widowers as well as widows.

It is my understanding that the State Retirement Board has taken the position that §101 should be interpreted literally and that the annual allowance should be paid only to widows and not widowers. The Board has expressed concern that there have been alterations to other sections of the chapter, which have inserted surviving spouse language, and has pointed out that the legislature may have intended §101 to apply exclusively to widows since §101 was not altered at the same time. Other Retirement Boards, who are entitled to a contribution or reimbursement from the State Retirement Board, have taken a contrasting view from that of the State Retirement Board. In addition, another state agency, the Contributory Retirement Board, has interpreted a different section of the pension statute that similarly still contains sex-specific beneficiary terms to require the payment of dependency benefits a gender-neutral manner.[2] *Flanagan v. Dedham Retirement Board,* CR-8995 (March 13, 1986).

My position as the chief law officer for Massachusetts empowers and requires me to "set a unified and consistent legal policy for the Commonwealth". *Secretary of Administration & Fin. v. Attorney General*, 367 Mass. 154, 163 (1975). In the instant case, there is a conflict among various Retirement Boards about the correct interpretation of §101. I am issuing this opinion in order to establish a unified legal policy for the agencies of the Commonwealth to follow with regard to benefits payable to widowers under §101. *See Feeney v. Commonwealth*, 373 Mass. 359, 364 (1977) (Attorney General responsible for formulating uniform and consistent legal policy of the Commonwealth).

My conclusion that the State Retirement Board should pay widowers benefits under G.L. c.32, §101 is compelled by fundamental principles of state and federal constitutional law, *Weinberger v. Wiesenfeld*, 420 U.S. 636 (1975); *Lowell v. Kowalski*, 380 Mass. 663, 665-666 (1980), and is consistent with state law governing statutory construction. *See* G.L. c.4, §6, cl.4, (words of the masculine gender may include the feminine gender). In the instant case, if G.L. c.4, §6, cl.4 is utilized to analyze the statutory provision in issue, the word "widow" can reasonably be expanded to include widowers and thereby avoid an interpretation that would clearly violate both the Massachusetts and federal constitution.

G.L. c.4, §6, cl.4 was applied by the Supreme Judicial Court to a benefits statute with the result that the masculine pronoun was construed to include the feminine. *Brown's case,* 322 Mass. 429, 430 (1948) (workmen's compensation dependency benefits available to children of injured mothers as well as injured fathers where statute used term "his injury"). The Court ruled that, in statutes where the masculine gender is used, the masculine gender shall be construed as including the feminine, unless it would "involve a construction inconsistent with the manifest intent of the law-making body or repugnant to the context of the same statute." *Id. See also*

G.L. c.6. A reading of G.L. c.32, §101 to include widowers within "widows" is consistent with the intent of the section, which appears to be the provision of annual benefits to the surviving spouse of a disabled public employee.

An argument can be made that, since the legislature has amended certain other provision of Chapter 32 to make benefits available to spouses regardless of sex, they consciously did not choose to alter the wording of §101, which refers exclusively to widows. *See, e.g.*, G.L. c32, §100 (pensions to "surviving spouses" of firefighters, police officers, or corrections officers killed in performance of duties; formerly read "widow"). In contrast, the only amendments to §101 have increased the amount of the annual benefit to be paid to a widow and have not otherwise altered the wording of the statute. St. 1984, c. 389, §4; St. 1972, c. 793, §5; St. 1964, c. 490.

However, it is a well-established principle of statutory construction that statutes should be construed, if possible, in such a way as to avoid unconstitutionality. *Loriol v. Keene*, 343 Mass. 358, 363 (1962). *See also Commonwealth v. Slome*, 321 Mass. 713, 716 (1947). An application of §101 to allow benefits to be paid solely to widows would clearly violate both the federal and Massachusetts constitutions. *See Wengler v. Druggists Mutual Ins. Co.*, 446, U.S. 142 (1980); *Califano v. Goldfarb*, 430 U.S. 199 (1977); *Weinberger v. Wiesenfeld*, 420 U.S. 636 (1975); *Lowell v. Kowalski*, 380 Mass. 663, 665-666 (1980). Under the Massachusetts Equal Rights Amendment, classifications based on sex are subject to a degree of constitutional scrutiny which is more stringent than the scrutiny under the federal Equal Protection Clause. *Lowell v. Kowalski*, 380 Mass. at 665, 666; *Attorney General v. Massachusetts Interscholastic Athletic Association*, 378 Mass. 342, 354 (1979); *Commonwealth v. King*, 374, Mass. 5, 21 (1977). Legislative prohibitions or exclusions based on gender are "prima facie invalid" under the Equal Rights Amendment. *Attorney General v. MIAA*, 378 Mass. at 353. *See also Opinion of the Justices*, 374 Mass. 836, 842 (1977). Such classifications are only permissible when they meet the compelling state interest test. *See Buchanan v. Director of Employment Security*, 393 Mass. 329, 334 (1984) (statutes facially unconstitutional where explicit sex-based distinctions not based upon compelling state interest).

Thus, if G.L. c.32, §101 is construed to prohibit widowers from receiving an annual allowance following the death of a disabled spouse, it is facially invalid under the ERA because it discriminates on the basis of gender. Accordingly, it is constitutionally defective unless it meets the compelling state interest test.[3] However, if the statutory provision in question is interpreted to exclude widowers, it would not pass the compelling state interest test for the reasons discussed in the remainder of this Opinion.

Even under the lesser scrutiny accorded gender based classifications challenged as violating the federal constitution, statutes providing benefits for widows only have uniformly been held unconstitutional. *Wengler v. Druggists Mutual Ins. Co.*, 446 U.S. 142, 143 (1980) (Missouri statute granting death benefits to widows, but not widowers, who have not proven incapacity or economic dependence on deceased spouse invalidated); *Califano v. Goldfarb*, 430 U.S. 199, 204 (1977) (federal statute granting Social Security survivors' benefits to all widows only without proof of financial dependency on deceased violative of Equal Protection Clause); *Weinberger v. Wiesenfeld*, 420 U.S. 636, 637-639 (1975) (federal statute granting Social Security survivors' benefits solely to widowed mothers and not fathers declared unconstitutional). Significantly, if interpreted to provide benefits to widows only, the Massachusetts statute in issue here would be more discriminatory than some of the invalidated federal statutes. In *Wengler* and *Goldfarb*, while widows alone could automatically qualify for benefits, widowers who could prove financial dependence on their deceased wives would also qualify for benefits. 446 U.S. at 144, 145; 430 U.S. at 201. In contrast, if G.L. c.32,

§101 is interpreted to exclude widowers from the benefits provision, the exclusion would be irrebutable. Such an outright prohibition "indisputably mandates gender-based discrimination." *Wengler*, 446, U.S. at 14.

If §101 is interpreted in this way, it would provide female public employees with less protection for their spouses than that provided for male employees solely because of the employee's gender. As in *Wiesenfeld*, where a widowed father was denied survivors' benefits only because of his sex, a denial of death benefits in the Massachusetts statute would "clearly operate. . .to deprive women of protection for their families which men receive as a result of their employment." 420 U.S. at 645.

Such a result would discount the role of female public employees in the paid work force, maintain sexual inequality, and foster governmental discrimination.[4] In *Wiesenfeld*, an unanimous United States Supreme Court found a virtually identical gender-based exclusion to be an "archaic and overbroad generalization" not tolerated under the federal Constitution. 420 U.S. at 643.

With regard to the statutory provision in question, there appears to be no legislative history available to signal the need which §101's sex-specific language was intended to serve. From justifications advanced by governmental agencies in other jurisdictions defending similar statutes, it can be inferred that the legislature concluded that female spouses of public employees would normally be dependent upon their husbands, while male spouses of public employees would not need benefits.[5] However, such justifications have been offered without success by the parties defending similar statutory gender classifications against claims they violated the federal Equal Protection Clause. *See Frontiero v. Richardson*, 411 U.S. 677 (1973) (statute invalidated where dependents' benefits available to wife of serviceman without proof of need, but only to husband of servicewomen if husband proves financial dependency).

Furthermore, even if the presumption that widows tend to be more economically dependent than widowers on their spouses had some empirical support, that "gender-based generalization cannot suffice to justify the denigration of the efforts of women who do work and whose earnings contribute significantly to their families' support." *Wiesenfeld*, 420 U.S. at 645. Similarly, in *Wengler*, administrative convenience and the bare assertion that men are more likely to be principal supporters of their spouses than women was found to fall far short of adequately justifying gender-based discrimination. 446 U.S. at 151-52.

In the present case, there is no evidence whatsoever that excluding the benefits of §101 from widowers has any empirical support and, particularly in light of the lack of a dependency criterion, it is difficult to imagine how such gender-based discrimination could be justified.[6] Moreover, since the legislative justification which conceivably could be offered to support the distinction between widows and widowers has been consistently viewed as insufficient by the courts under the lesser federal standard, it may be concluded that a Massachusetts court applying the more stringent ERA standard would rule that the exclusion of widowers under §101 would not meet the compelling state interest test.

Where a statutory provision has been declared an unconstitutional sex-based classification, the question of the proper remedial course arises. *Califano v. Westcott*, 443 U.S. 76, 82, 89 (1979). *See also Wengler*, 446 U.S. at 152. Two options are available: the law may be invalidated in its entirety or the provision may be extended to cover both men and women. *Califano v. Westcott*, 443 U.S. at 82, 89 (choices were to enjoin operation of sexually discriminatory welfare program or extend benefits to both sexes; Court extended benefits). Generally, the courts have suggested that extension, not nullification, is the proper course of action. *Id.* at 89. *See also Califano v. Goldfarb*, 430 U.S. 100 (1977); *Frontiero v. Richardson*, 411 U.S. at 691 and n.25. *Accord Lundgren v. Whitney's, Inc.*, 614 P.2d.

1272 (Wash. Sup. Ct. 1980) (right to sue for loss of consortium extended to wives where right previously available only to husbands).

In the instant case, extension of the benefits of §101 to widowers as well as widows is consistent with the spirit of the statute and would accomplish the apparent object intended by the legislature to provide spouses of disabled public employees with benefits.[7] *See Califano v. Westcott*, 443 U.S. at 82 (extension of benefits to unemployed parents regardless of sex ordered where strong commitment in legislation to goal of assisting needy children). Such a result would also be in keeping with the statutory construction delineated in c. 4, §6, cl. 4 and consonant with the provisions of the Massachusetts and federal constitution. Accordingly, I therefore conclude that the proper answer to the State Retirement Board's question is yes, if G.L. c.32, §101 is to be implemented in a constitutional manner, an annual benefit must be paid to widowers as well as widows.

Very truly yours,

JAMES M. SHANNON
ATTORNEY GENERAL

[1] §101 of G.L. c.32 provides that if a disabled public employee is "unable to provide for any annual allowance to be paid to his *widow*," the widow shall be paid, with certain restrictions, an annual allowance of $3,000. (emphasis supplied)

[2] In *Flanagan*, the issue was whether G.L. c.32, §9(2)(c) should be interpreted to grant dependency benefits to the brother of a deceased member where the statute referred exclusively to "sister". *Id.* using the Equal Rights Amendment as the basis, the Contributory Retirement Board ruled that an otherwise qualified brother should receive the same benefits as a sister would have under G.L. c.32, §9(2)(c). *Id.* In a subsequent announcement, the Public Employees Retirement Administration (PERA) stated its "intention to follow CRAB's decision and apply the Equal Rights Amendment to those sections of chapter 32 which are not gender neutral." Vol. IV, P.E.R.A. Bulletin, No. 1 (April, 1986).

[3] In only one case has the Supreme Judicial Court found a sex-based legislative classification to be supported in any respect by a compelling state interest. *Lowell v. Kowalski*, 380 Mass. at 666 (compelling interest in distinguishing right of an illegitimate child to inherit from her natural mother as opposed to her father). Nonetheless, in that case, the court ruled that the statute was not properly confined to the fulfillment of that interest and was overbroad. *Id.*

[4] The exclusion of widowers clearly discriminates against working women and surviving husbands as opposed to working men and widows. *Wengler*, 446 U.S. 150 at n.5.

[5] It sould be noted, however, that the benefits of G.L. c.32, §101 are not based upon need. If a male public employee retires due to a job related disability and dies from a cause different from his disability, his widow need not prove actual economic need in order to receive an annual allowance. G.L. c.32, §101.

[6] As noted by the Supreme Judicial Court in *Attorney General v. MIAA*, even "benign purposes may inadvertently perpetuate outmoded stereotypes." 378 Mass. at 356 n.32.

[7] A cursory reading of Chapter 32, the pension statute, reveals eight other sections which appear to refer exclusively to widows or wives. G.L. c.32, §12C; 44B; 59A; 85J; 89B; 89C; 89D; 92A. It should be noted that all of these sections may suffer from the same constitutional defect as §101 and either need to be interpreted in a gender-neutral manner or be legislatively corrected.

June 16, 1988

Charles V. Barry
Secretary
Executive Office of Public Safety
One Ashburton Place
Boston, Massachusetts 02108

Dear Secretary Barry:

You have requested my opinion on the scope of G.L. c. 148, § 25A 1/2, a statute requiring that older high-rise buildings in the Commonwealth be retrofitted with automatic sprinklers. Specifically, you have asked whether the statute "requires that automatic sprinklers be provided in buildings constructed prior to January 1, 1975 either as condominiums or converted to condominiums before or after that date."[1] G.L. c. 148, § 26A 1/2 expressly exempts from the sprinkler requirement buildings which have been submitted to the provisions of the general laws governing condominiums, i.e. G.L. c. 183A. The question has arisen, however, as to when a building must have been submitted to the condominium law in order to be exempt from the sprinkler requirement.[2] For the reasons stated below, it is my opinion that only buildings converted to, or constructed as, condominiums prior to January 1, 1975, are exempt from the automatic sprinkler requirement of G.L. c. 148, § 26A 1/2.

The canons of statutory construction that must guide my analysis are familiar. "Ordinarily, if the language of a statute is plain and unambiguous it is conclusive as to legislative intent." *Sterilite Corp. v. Continental Casualty Co.*, 397 Mass. 837, 839 (1986). However, "time and time again," the Supreme Judicial Court has stated that "we should not accept the literal meaning of the words of a statute without regard for that statute's purpose or history." *Id.* Moreover, the Court has declined to interpret a statute literally when such an interpretation would lead to an absurd or unworkable result. *See, e.g., Apkin v. Treasurer and Receiver General*, 401 Mass. 427, 435 (1988) (declining to interpret federal age discrimination law as preempting state mandatory retirement law for state judges "whatever the [federal law] may say if read literally"); *Board of Appeals of Hanover v. Housing Appeals Committee*, 363 Mass. 339, 355 (1973) ("we must avoid a construction of statutory language which produces irrational results"). Interpreting public safety legislation requires special care to ensure that a statute's public safety purposes are effectuated. *See Pruiss v. Springfield*, 21 Mass. App. Ct. 960, 961 (1986), *citing Whirlpool Corp. v. Marshall*, 445, U.S. 1, 13 (1980).

With these principles in mind, I turn to the language of the statute at issue. G.L. c. 148, § 26A 1/2 provides that "[e]very building or structure" over 70 feet and constructed prior to January 1, 1975 "shall be protected with an adequate system of automatic sprinklers in accordance with the provisions of the state building code . . ." G.L. c. 148, § 26A 1/2. The statute further provides that "sprinklers shall not be required to be installed in buildings where construction has commenced prior to January first, nineteen hundred and seventy-five and which have been submitted to the provisions of chapter one hundred and eight-three A . . ." *Id.* Taken literally, the exemption for condominiums might appear to exempt from the sprinkler requirement any building constructed prior to January 1, 1975, which has *at any time* satisfied or will satisfy the legal formality of being submitted to the provisions of c. 183A, i.e. by the execution or recording of a master condominium deed.[3] However, such an interpretation of the exemption must be rejected for several reasons.

A broad interpretation of the condominium exemption would undercut the primary purpose of G.L. c. 148, § 26A 1/2, which is, quite clearly, to protect the public

from the hazards of fires in older, high-rise buildings. G.L. c. 148, § 26A 1/2, which codifies, in part, chapter 633 of the Acts of 1986, was enacted on December 23, 1986. St. 1986, c. 633, § 2. The law prior to that time only required high-rise buildings constructed after January 1, 1975, to be equipped with automatic sprinklers.[4] Attention was focused on the inadequacy of the prior law in the aftermath of a highly publicized fire in the Prudential Building on January 2, 1986. *See* The Boston Globe, January 3, 1986, at 1 (noting that efforts to fight Prudential fire were hampered by absence of sprinkler system); The Boston Globe, January 8, 1986, at 16 (editorial noting that Prudential was not required to have sprinklers under state law at the time). The original version of the bill that was enacted into law as G.L. c.148, §26A 1/2 was filed soon after the Prudential fire. *See* Mass. H. 862 (1986).

As you have elsewhere noted, there is no reason to believe that high-rise condominium buildings, as a class, present less of a fire-safety risk than any other class of buildings. *See* Letter from Secretary Charles Barry to Senator Patricia McGovern (November 14, 1986) (on file in Attorney General's library). Fires in high-rise residential buildings create particular life-safety concerns. R. Coleman, Management of Fire Service Operations 305 (1978). In addition, there is no apparent public-safety rationale for distinguishing between condominiums and other types of residential buildings, such as apartments. Any argument based on preserving the freedom of choice of condominium owners[5] ignores a basic premise of fire-safety laws, which *intentionally restrict* individual choice to run risks the Legislature deems unreasonable. Such restrictions are justified by the fact that the costs of a fire are not simply borne by the property owner. All of a building's occupants, residents, workers and visitors, as well as neighbors, firefighters, insurers, and the public at large, have a strong stake in whether sprinklers are installed in a building, particularly in a high-rise building. *See generally* R. Coleman, Management of Fire Service Operations 294-332 (1978) (describing difficulty of fighting high-rise fires). In view of these considerations, a narrow construction in favor of the statute's public safety purposes is appropriate. *Cf.* Sutherland, Statutory Construction §71.04, 537 (4th ed. 1986) ("modern trend has been to give . . . [public safety] legislation a liberal interpretation in favor of its objectives").

Indeed, interpreting the condominium exemption to apply to all older high-rise buildings submitted at any time to the provisions of G.L. c. 183A would threaten completely to undermine the statute with regard to high-rise residential buildings. Of the several hundred buildings in the Commonwealth that come within the ambit of the law, *see* Press Release of Governor Michael S. Dukakis (December 23, 1986) (on file in State House library), a substantial proportion are residential. *See* Letter of Joseph A. O'Keefe, State Fire Marshall, to Assistant Attorney General (January 27, 1988) (on file in Attorney General's library). Among those, a significant number are condominiums, *Id.*, and many more could be converted to condominiums in the future. In fact, owners of apartment buildings would have a strong incentive to submit their buildings to the provisions of chapter 183A—a legal formality—if, by doing so, they could avoid the cost and inconvenience of putting in automatic sprinklers.[6] In my opinion, the Legislature could not have intended to create such a gaping loophole. *Cf.*, 1916 Op. Att'y Gen. 585, 586 (avoiding interpretation of exception to 1914 automatic sprinkler law which would practically emasculate the law).[7]

Rejecting a broad interpretation of the condominium exemption, I conclude that the statute only exempts condominiums converted or constructed prior to January 1, 1975. This conclusion is supported by the exemption's specific reference to buildings "where construtions has commenced prior to January first nineteen hundred and seventy-five." The entire section 26A 1/2 concerns buildings constructed prior to January 1, 1975, as distinguished from section 26A, which covers buildings

constructed or substantially altered after that date. St. 1975, c. 676, § 3. The Legislature had no reason to repeat the January 1, 1975 date in the condominium exemption unless it intended the exemption to be read temporally, i.e. to exempt buildings whose construction has commenced prior to January 1, 1975 and which have been submitted to the condominium provisions *by then*. Any other interpretation would make the repetition of the date surplusage. *Cf. The United States Jaycees v. Massachusetts Commission Against Discrimination*, 391 Mass. 594, 602 (1984) (''every word of a legislative enactment is to be given force and effect'').[8]

Finally, my conclusion that the statute does not exempt condominiums converted after January 1, 1975 is supported by the necessity to harmonize § 26A 1/2 with § 26A, the sprinkler requirement for newer buildings. Section 26A requires automatic sprinklers in ''buildings and structures the construction *or substantial alteration* of which began after January first, nineteen hundred and seventy-five.'' St. 1975, c. 676, § 3 (emphasis added). To the extent that a post-January 1, 1975 condominium conversion involved the substantial alteration of a building constructed prior to 1975, section 26A would require that automatic sprinklers be installed. An interpretation of section 26A 1/2 that exempted such a building from putting in automatic sprinklers merely because it had been submitted to the provisions of chapter 183A, would directly conflict with section 26A. Indeed, it would make no sense for the Legislature to require sprinklers in brand-new condominium buildings but not in newly-converted older buildings that have been gutted and rehabilitated. Sections 26A and 26A 1/2 are most persuasively harmonized by reading the condominium exemption to apply only to buildings converted prior to January 1, 1975. *Cf. Registrar of Motor Vehicles v. Board of Appeal on Motor Vehicle Liability Policies and Bonds*, 382 Mass. 580, 585 (1981) (''where two or more statutes relate to the same subject matter, they should be construed together so as to constitute an harmonious whole consistent with the legislative purpose'').

In sum, it is my opinion that only buildings converted to or constructed as condominiums prior to 1975 are exempt from the sprinkler requirement of G.L. c. 148, §26A 1/2. This interpretation is necessary to effectuate the public-safety purposes of the legislation and to avoid an irrational result that an arguably literal reading would entail. Moreover, this interpretation integrates other language in the statute and best harmonizes the meanings of sections 26A and 26A 1/2.

Sincerely,

JAMES M. SHANNON
ATTORNEY GENERAL

[1] You have asked for my opinion in your capacity as the executive and administrative head of the Executive Office of Public Safety, within which is the Division of Fire Prevention under the charge of the Fire Marshall. *See* G.L. c.22, §3; G.L. c.6A,§18.

[2] In pertinent part, G.L. c. 148, § 26A 1/2 provides:

> Every building or structure of more than seventy feet in height above the mean grade and constructed prior to January first, nineteen hundred and seventy-five, shall be protected with an adequate system of automatic sprinklers in accordance with the provisions of the state building code; provided, however, that sprinklers shall not be in

public or private libraries; *provided, further, that sprinklers shall not be required to be installed in buildings where construction has commenced prior to January first, nineteen hundred and seventy-five and which have been submitted to the provisions of chapter one hundred and eighty-three A*; and, provided further, that automatic sprinklers shall not be required in rooms or areas of a telephone central office equipment building when such rooms or areas are protected with an automatic fire alarm system. (emphasis added)

[3] Chapter 183A contains the provisions of law governing condominiums. An owner of land may "submit" his property to the provisions of chapter 183A "by duly executing and recording a master deed. . . containing a statement to the effect that the owner. . . proposes to create a condominium to be governed by the provisions of" chapter 183A. G.L. c. 183A, § 2.

[4] In 1973, the Legislature required all high-rise buildings (i.e. those more than seventy feet in height above the mean grade) constructed after March 1, 1974 to be protected with automatic sprinklers. St. 1973, c. 395, codified as amended at G.L. c. 148, § 26A. In 1975, the Legislature modified the 1973 sprinkler law and made it applicable to high-rise buildings constructed or substantially altered after January 1, 1975. St. 1975, c. 676, codified in part at G.L. c. 148, § 26A. Automatic sprinklers have also been required in buildings or additions constructed after July 1, 1983 that have a floor area of more than 7500 gross square feet and in lodging or boarding houses. G.L. c. 148, §§ 26G, 26H. The first automatic sprinkler law dates back to 1914. St. 1914, c. 795, § 10, codified as amended at G.L. c. 148, § 26 (basements of certain business establishments required to be equipped with atuomatic sprinklers).

[5] One might attempt to rationalize exempting condominiums, but not apartments, on the ground that condominium owners could choose to put in sprinklers if they wanted to go through the expense and inconvenience, but that apartment dwellers have no control over the decision whether to put in sprinklers and thus must be protected by the statute. This argument is extremely weak, however, even on its own terms. In the first place, many condominiums are rented out as apartments. Second, if the Legislature had been concerned with preserving individual choice, then one would expect it to have exempted others thought capable of implementing their choices, such as cooperative owners. *See generally* G.L. c. 157B (governing housing cooperatives). Third, individual condominium owners in a large condominium association probably do not have more control over the association's decision to put in sprinklers, which must be done building-wide for all practical purposes, than apartment dwellers have over a landlord's decision to put in sprinklers.

[6] Submitting a building to the provisions of chapter 183A by executing and recording a master deed is neither difficult nor necessarily expensive. G.L. c. 183A, § 8 spells out the particulars that must be included in a master deed, including descriptions of the building and units, floor plans, statement that bylaws have been enacted, etc. Nothing in Chapter 183A would prohibit an apartment building owner from submitting his building to the provisions of chapter 183A, while retaining ownership and leasing each of the condominium units.

[7] I note parenthetically that a broad interpretation of the condominium exemption, which would encourage the conversion of buildings to condominiums, would also undercut the Legislature's declaration in 1983 of a "rental housing emergency" created in part by the effect of conversion of rental housing into condominiums or cooperatives. St. 1983, c. 527, § 1.

[8] It might be argued, however, that the reference to buildings where construction has commenced prior to January 1, 1975 in the condominium exemption, while redundant, was meant to emphasize that this section did not alter section 26A, which requires all post-1975 buildings to have automatic sprinklers. A simple exclusion of condominiums in section 26A 1/2 arguably might have been read to exclude condominiums constructed after 1975, notwithstanding section 26A. This argument is plausible, but not persuasive because it does not explain why the Legislature would emphasize that the condominium exemption did not conflict with section 26A and not similarly emphasize that the exemption for libraries and telephone central office equipment buildings in section 26A 1/2 did not conflict with section 26A.

June 30, 1988

Honorable Arthur M. Mason
Chief Administrative Justice of the Trial Court
New Court House
Pemberton Square
Boston, Massachusetts 02108

Dear Judge Mason:

You have requested my opinion as to whether court officers employed by the Massachusetts Trial Court who become disabled by bodily injuries resulting from acts of violence of prisoners in their custody during or awaiting court sessions are eligible to receive benefits under the "assault pay" provision contained in G.L. c. 30, §58. For the reasons set forth below, I answer your question in the affirmative.

Section 58 of Chapter 30 of the Massachusetts General Laws provides compensation for injuries sustained by employees while in the service of the commonwealth. The section refers to the worker's compensation scheme embodied in G.L. c. 152 and also regulates the use of sick leave credits by injured state employees. The last paragraph of §58, the so-called "assault pay" provision, reads as follows:

> Notwithstanding the provisions of this section, an employee who, while in the performance of duty, receives bodily injuries resulting from acts of violence of patients or prisoners in his custody, and who as a result of such injury would be entitled to benefits under said chapter one hundred and fifty-two, shall be paid the difference between the weekly cash benefits to which he would be entitled under said chapter one hundred and fifty-two and his regular salary, without such absence being charged against available sick leave credits, even if such absence may be for less than eight calendar days' duration.

The question you have raised is whether court officers of the Massachusetts Trial Court are eligible to receive benefits pursuant to this section.

Elementary principles of statutory construction require that "[a] statute . . . be interpreted according to the plain and ordinary meaning of its words and their ordinary and approved usage." *Commonwealth v. Colon-Cruz*, 393 Mass. 150, 167 (1984). The plain language of §58 compels the conclusion that coverage under the assault pay provision extends to any employee of the commonwealth who is both: (1) injured in the manner specified in the statute; and (2) eligible to receive worker's compensation under G.L. c. 152 as a result of such injury.

In regard to the first issue raised, it is apparent that court officers of the Trial Court are entitled to benefits under the assault pay provision if they are injured in the manner specified in §58, that is, if while in the performance of duty they receive bodily injuries resulting from acts of violence of patients or prisoners in their custody.

This interpretation of §58 is consistent with the general rule that statutory language is to be "construed so as to effectuate the intent of the drafters of the statute." *McCarthy v. Commissioner of Revenue*, 391 Mass. 630, 633 (1984). "The purpose of [the assault pay] provision is to extend benefits up to the amount of an injured state employee's full weekly wage when such employee is injured by the violence of a patient or prisoner in his custody." 1966/67 Op. Att'y Gen. No. 68, Rep. A.G., Pub. Doc. No. 12 at 133 (1967). The legislature thereby intended to compensate state employees "who are victimized in some violent manner by their exposure to a greater than normal risk of violence." *Id.* Similarly, another prior Opinion of the Attorney General observes that in enacting the assault pay provision, "the General Court intended to compensate for the added hazards to which such employees of a correctional or mental institution are exposed when their duties

entail the care or custody of mental patiens or prisoners.'' 1966/67 Op. Att'y Gen. No. 69, Rep. A.G., Pub. Doc. No. 12 at 134 (1967).[1] It is not disputed that the duties of court officers may include retaining custody of patients or prisoners. *See, e.g., McCarthy v. Sheriff of Suffolk County*, 366 Mass. 779, 787 (1975) (''as deputy sheriffs, many court officers are responsible for the custody of prisoners in the criminal sessions'').[2] Accordingly, court officers are among the state employees exposed to a greater than normal risk of violence by virtue of their responsibility to retain custody over prisoners from time to time. Court officers therefore fall squarely within the class of intended beneficiaries of the assault pay statute.

The second question raised requires that I evaluate whether court officers are eligible to receive worker's compensation as a general matter. The eligibility of court officers employed by the Trial Court to receive worker's compensation under G.L. c. 152 is governed by the provisions of that chapter generally applicable to state employees. *See* G.L. c. 152, §§69-75. Although there is no reported decision conclusively ruling that court officers are covered by the worker's compensation statute, ''[i]n furtherance of the purpose of the act, it is to be construed broadly to cover as many employees as possible.'' *Collins's Case*, 342 Mass. 389, 392 (1961). I am not aware of any instance in which an otherwise valid worker's compensation claim filed by a court officer has been denied because of his or her employment status. I also note that the legal standard which distinguishes between state ''employees'' eligible to receive worker's compensation and state ''officials'' not eligible to receive worker's compensation involves an inquiry into whether a particular public servant or class of public servants exercises some portion of the sovereign authority of the Commonwealth. *See* 1945 Op. Att'y Gen., Rep. A.G., Pub. Doc. No. 12 at 51 (1945); *Attorney General v. Tillinghast*, 203 Mass. 539 (1909). Court officers would not seem to be entrusted with such sovereign authority.[3] Under the circumstances, I find it reasonable to conclude that court officers are eligible to receive worker's compensation under G.L. c. 152. Thus, if a court officer would be eligible to receive worker's compensation as a result of injuries received as defined in §58, that individual would be eligible to receive assault pay benefits.

For the reasons set forth above, I conclude that court officers employed by the Massachusetts Trial Court are covered by the assault pay provision of G.L. c. 30, §58.

Very truly yours,

JAMES M. SHANNON
ATTORNEY GENERAL

[1] Because the opinion only mentions employees of correctional and mental institutions, the opinion could arguably be interpreted as excluding all other state employees from coverage under the assault pay statute. This excerpt, however, must be read in light of the particular question presented, i.e., whether a partially disabled employee of the Department of Mental Health could simultaneously receive benefits under both the assault pay statute and the partial disability provision contained in G.L. c. 152, §35. The quoted passage is not an all-inclusive list of the state employees who are eligible to receive benefits under the assault pay provision.

It should also be noted that an interpretation of the cited opinion as limiting eligibility for compensation under the assault pay provision soley to employees of correctional and mental health institutions would conflict not only with the plain language of the statute, but also with language from a related Opinion of the Attorney General which was issued the very same day. *See* 1966/67 Op. Att'y Gen. No.

68, Rep. A.G., Pub. Doc. No. 12 at 133 (1967). That opinion interpreted the custody requirement in §58 to mean that the legislature was "*mainly* contemplating institutionalized patients or prisoners." *Id.* (emphasis added). This characterization of the intended scope of coverage afforded by §58 implicitly envisions application of the statute, however rarely, in non-institutional settings.

[2] Moreover, since sheriffs and their deputies are part of the state's correctional system, *see* G.L. c. 37, §17, there is no meaningful distinction between court officers and other correctional officers for the purposes of §58.

[3] *But see Wagner v. Hartford Accident & Indemnity Co.*, 81 So. 2d 580 (La. Ct. App. 1955) (probation officers for juvenile courts are officials rather than employees for purposes of the Louisiana Workmen's Compensation Act). *Compare County of Cook v. Industrial Commission*, 304 N.E. 2d 616 (Ill. 1973) (juvenile probation officers are employees rather than officials for purposes of the Illinois Workmen's Compensation Act).

## INDEX OF OPINIONS



## INDEX OF REQUESTING AGENCIES

The Commonwealth of Massachusetts

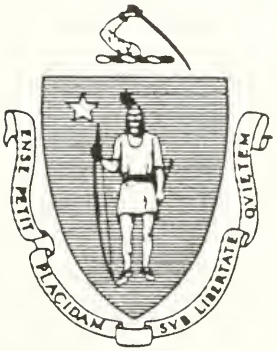
# Supplement to the REPORT

OF THE

# ATTORNEY GENERAL

FOR THE

Year Ending June 30,1988

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# CIVIL BUREAU

## INDUSTRIAL ACCIDENT DIVISION

The Industrial Accident Division serves as legal counsel to the Commonwealth in all workers' compensation cases involving state employees. Pursuant to M.G.L. c. 152 §69A, the Attorney General must approve all payments of benefits and disbursements for related medical and hospital expenses in compensation cases. In contested cases the Division represents the Commonwealth before the Department of Industrial Accidents and, in appellate matters, before the Appeals Court and the Supreme Judicial Court.

Recent amendments to M.G.L. chapter 152 have considerably overhauled the process of filing and litigating claims. Specifically, the reforms have created an expedited scheduling requirement, designed to process claims from filing to hearing in 90 days. Also, a new mandatory appearance has been added to the process requiring a conciliation stage for all claims. The purpose of the conciliation is to promote settlement of claims before they go to dispute resolution. The recent amendments also require the insurer to approve or deny all claims within 14 days.

The amendments have created four new Board locations within the Department of Industrial Accidents in Lawrence, Fall River, Worcester and Springfield, in addition to the main office in Boston. Accordingly, the staff of the Division now has to appear at these locations.

In response to these amendments, the Division has appeared before the Worker's Compensation Advisory Council in an attempt to elucidate specific sections of the act that pertain to the commonwealth. The Division has also participated in the Industrial Accident Rules Committee, re-drafting rules which set the procedural practices under the act.

The Division's efficiency in implementing the changes brought by Chapter 152 is reflected in the increased number of processed payments and resolved claims. There were 17,950 First Reports of Injury filed during fiscal year 1988 for state employees with the Division of Industrial Accidents—an increase of 1,820 over fiscal year 1987. Of the lost time disability cases, the Division reviewed and approved 3,205 new claims for compensation and numerous claims for resumption of compensation. In addition, the Division disposed of 52 claims by way of lump sum agreements, and 17 by payment without prejudice.

The Division appeared for the Commonwealth on *2,298 formal assignments before the Department of Industrial Accidents*, an increase of 861 over the previous fiscal year. The Division also appeared before the Superior Court concerning enforcement of orders pursuant to M.G.L. c. 152 §12(1), and before the Appeals Court on appeals from decisions of Industrial Accident Review Board pursuant to M.G.L. c. 152 §12(2). In addition to evaluating new cases, the Division continually reviews the accepted cases to bring the medical reports up to date and to determine present eligibility for compensation.

Total disbursements by the Commonwealth for state employee's Industrial Accidents claims, including accepted cases, Board and Court decisions and lump sum settlements, between July 1, 1987 to June 30, 1988 follow:

### General Appropriation to Division of Industrial Accidents

| | |
|---|---|
| Incapacity Compensation | $24,569,638.54 |
| Medical Payments | 5,967,873.00 |
| Total Disbursement | $30,537,511.54 |

The Division is also responsible for *pursuing the Commonwealth's subrogation claims*. Pursuant to M.G.L. c. 152 §15, the Division is entitled to seek recovery from third party tort-feasors. The recovery under §15 includes compensation and medical bills paid to a claimant, as a result of a third party's negligence. In FY 1988, the Division recovered $123,858.02 in liens against third party tort-feasors.

Under chapter 152 §65, the Division has the responsibility of *defending the Workers Compensation Trust Fund against claims for reimbursement* made under chapter 152 §§37 and 37A. Workers Compensation Trust Fund and related sections encourage employment of handicapped and disabled workers. The Fund relieves the insurer from the burden of paying compensation for an employee's disability due to the combined effect of a previous injury and a subsequent one.

Pursuant to G.L. c. 33, §§13-11A, *the Chief of Industrial Accident Division represents the Attorney General on the Civil Defense Claims Board*. The Claims Board reviews and processes claims for compensation of unpaid civil volunteers who were injured in the course of their volunteer duties.

The Division also *represents the Industrial Accident Rehabilitation Board*. When an insurer refuses to pay for rehabilitative training for an injured employee, the Division represents the case to the Industrial Accident Rehabilitation Board.

During the fiscal 1988, Division attorneys were asked to assist workers in private industry who were having problems with compensation claims against private industry and their insurers. Every effort was made to assist these employees or refer them to appropriate persons or agencies.

The Division also represented the Department of Industrial Accidents in a nationwide lawsuit. The case involved a request for a permanent injunction against all state compensation commissioners throughout the nation from adjudicating cases involving worker compensation claims against *Allis-Chalmers*. The case was settled after the National Steering Committee of State Attorneys General filed a brief challenging the constitutionality of the request. Attorneys from this office represented Massachusetts on that Steering Committee.

## CONTRACTS

The responsibilities of the Contracts Division generally fall into three areas: litigation involving matters in a contractual setting; advise and counsel to state agencies concerning contractual matters; and contract review.

The Contracts Division *represents the Commonwealth, its officers, and agencies, as both party plaintiff and defendant in all civil actions involving contract and contract related disputes*.

Most cases handled by the Division concern public building, state highway, and public work construction disputes. Other typical cases involve claims arising from the interpretation of leases, employment contracts, statutes, rules, regulations, and surety bonds.

In contract actions against the Commonwealth, G.L. c. 258, s.12, is the controlling statute and the Attorney General represents the Commonwealth in Superior Court in all such disputes.

At the commencement of contract actions, including bid protests, litigants often seek temporary restraining orders and preliminary injunctions against the Commonwealth, its agencies, and officers. The granting of such relief would delay the execution of contracts, increase contract cost to the public, and result in additional claims for damages. During the fiscal year, Division attorneys successfully resisted all such attempts for injunctive relief.

Government contract disputes are complex litigation involving multiple parties including architects, consulting engineers, subcontractors, suppliers, and surety companies. The discovery stage often involves the retrieval of massive numbers of documents which must be reviewed and analyzed. Trials of public contract actions also involve lengthy hearings before the Court or before Court appointed masters. As a result, the Contracts Division has begun to consider alternatives in resolving disputes which could provide simplified and expedited substitutes for formal litigation. Such alternatives could better protect state agencies, save taxpayer dollars and provide prompt and fair resolution of disputes for those doing business with the Commonwealth.

The Attorney General has placed renewed emphasis on instituting affirmative litigation to recover money owed to the Commonwealth due to contract breaches. The Division counsels the Department of Labor and Industries in enforcing orders and litigating architect selection and bid protest matters. The Attorney General is also the sole agency authorized by law to represent the state Inspector General in civil action to redress waste, fraud and abuse in government.

Along with the Executive Office of Transportation and Construction, Department of Public Works and other agencies, the Contracts Division has begun advance planning for resolution of disputes arising out of the $4-billion Central Artery and Third Harbor Tunnel Project.

Fifty-four new actions were commenced during FY 1988 and 203 files were closed. As of June 30, 1988, there were 161 pending cases in the Division representing a total dollar exposure to Massachusetts of $52,475,261. The Division is also handling affirmative claims on behalf of the Commonwealth in excess of $200 million.

On a daily basis, the Division *receives requests for legal assistance from state agencies and officials*. Problems involve formation of contracts, performance of contracts bidding procedures, bid protests, contract interpretation, and many other miscellaneous matters. The most frequent request deals with indemnification clauses in contracts, procedural matters in employment contracts and advice in advance of anticipated construction contract litigation.

The Contracts Division also receives requests for assistance in purchasing. Division members counsel the Purchasing Agent and his staff, interpret regulations, and attend informal protest hearings.

The Division has a similar relationship with the Department of Public Works, Metropolitan District Commission, Executive Office of Transportation and Construction, Board of Regents of Higher Education, the Departments of Mental Health, Mental Retardation, Youth Services, Environmental Management, Water Resources, and Public Welfare, State Lottery Commission, and Division of Capital Planning and Operations.

The Division *reviews many state contracts, leases, and bonds submitted by state agencies*. All contracts are logged in and out, and a detailed record is maintained. The average contract is approved within 48 hours of its submission to the Division.

During the fiscal year, the Division received 1,194 contracts for approval as to form. One-hundred-and-ninety contracts were rejected and later approved once the deficiencies were corrected.

## EMINENT DOMAIN

The Eminent Domain Division *represents the Commonwealth in the defense of petitions for the assessment of damages resulting from land acquisition by eminent domain*. The Commonwealth acquires land for a variety of purposes, including rights of way for roads, land for state colleges, land for recreation park purposes, land for flood control and land for easements. The Division deals primarily with the Department of Public Works, the Metropolitan District Commission, the Department of Environmental Affairs, state colleges, the University of Massachusetts, the Armory Commission, the Department of Food and Agriculture, the Department of Fisheries & Wildlife and Environmental Law Enforcement and the Department of Capital Planning and Operations.

The Division also *provides legal assistance to the Real Estate Review Board* in settling damage claims on takings of government-owned land for highway purposes. Additionally, the Division is sometimes asked to testify before the Governor's Council prior to its approving payment of land damage cases settled by the Department of the Attorney General.

*Informal advisory services on eminent domain questions* are rendered to practically every state agency, and cities and towns.

Chapter 79 of the General Laws prescribes the procedure in eminent domain proceedings. Under Chapter 79, when property is taken, the taking agency makes an offer of settlement known as a pro tanto, which makes available to the owners an amount the taking agency feels is fair and reasonable but reserves to the prior owners the right to proceed, through the courts, to recover more money. In the event of a finding by the court or jury, the pro tanto payment is subtracted from the verdict and the taking agency pays the balance, with 10% interest from the date of the taking to the date of the judgment.

If occupied buildings are situated on parcels acquired by eminent domain, the occupants become tenants of the Commonwealth and are obligated to pay rent. Rent collection is handled by a Special Assistant Attorney General who is assigned fulltime to the Department of Public Works (DPW). While reporting directly to the agency, the Special Assistant Attorney General's performance is reviewed by the Eminent Domain Division.

His primary responsibility is representing DPW in all matters related to state-owned property being leased or rented to the general public. This includes negotiating settlements, closing out uncollectibles, filing suits to enforce rent payment, as well as eviction. In those cases where rent is owed to the Commonwealth and there is a land damage case pending, the Eminent Domain Division trial attorney handles both matters at the time of trial.

During the past fiscal year, 40 rent cases were closed out and $166,460 was collected and turned over to the State Treasurer. During FY 1988, about 60 land damage cases were disposed of, the majority by trial before juries in Superior Courts

hroughout the Commonwealth. The disposition of these cases resulted in a savngs to the Commonwealth of approximately $10 million. In addition, more than 90 cases were disposed of in the Land Court.

The Eminent Domain Division also has the responsibility of *protecting the Commonwealth's interests in all petitions for registration of land filed in the Land Court.* n each case, a determination is made whether or not the Commonwealth, or any of its agencies, has an interest which may be affected by the petition. If such a letermination is made, the Division is given a full hearing before a decree is issued. Some issues are tried to a conclusion while others are amicably agreed upon with he rights of the Commonwealth protected by stipulation.

Land Court matters involve the full-time activities of an Assistant Attorney General. The court's jurisdiction covers every type of land transaction from oreclosure and tax takings to determination of title absolute as well as all the equiy rights arising from their determination.

The Eminent Domain Division is *involved in almost every petition to confirm r register title.* The involvement requires the determination of all interests in state ighways, the preservation of the taking lines, the determination of drainage and ther easements, and the assurance that the decree is entered with the proper tipulations.

Land Court also determines so-called "water rights". This is an increasing problem because many rivers and streams have been cleaned and improved through ederally-funded projects, bringing into question the Commonwealth's rights and esponsibilities. Additionally, the tidal areas of the Commonwealth are creating ontinual litigation, particularly where the Colonial Ordinances are concerned. Litigation is developing whereby the public is asserting possession and prescripive rights in the tideland flats and beach access.

The land registration process continues to involve diverse issues. Many railroad ights of way appear in registration cases. Many pose serious questions regarding abandonment and the effect upon the total railroad right of way. The Commonwealth, by way of the Secretary of Transportation, has acquired railroad rights of way for both passenger service and recreational uses. The reversionary rights nd the effects upon Commonwealth title are important issues.

The Commonwealth has become involved in problems caused by filling and dredgng along the shoreline and other areas developed by beach associations, especialy on the Cape and Islands. When dredging involves placing material on the shore, rivate access rights to and from the beaches are altered.

All rental agreements, pro tanto releases, general releases, deeds of grants and onveyance, and documents relating to land under the control of any of the state's departments or agencies must be reviewed and approved as to form by the Emiient Domain Division.

The Division continues to assist the Department of Food and Agriculture in exediting and implementing the mandates of Chapter 780 of the Acts of 1977, known as the Agricultural Preservation Restriction Act. This act helps to preserve the imited farm land remaining in Massachusetts by providing a method where farmers eceive compensation for the so-called "developmental rights" without destroyng the prductive capacity and value of the farm land. Once development rights are sold, a deed is then filed in the appropriate county registry which restricts the and use in perpetuity to farming and agricultural uses. Since the program began n 1977, more than 20,000 acres of farmland have been permanently protected n Massachusetts.

## TORTS

The Torts Division handles *primarily tort and civil rights suits brought against the Commonwealth and its employees, the investigation and preparation of reports for the district courts on Petitions for Compensation to Victims of Violent Crimes, Contributory Retirement Appeals Board (CRAB) cases, and collection cases.*

Collections cases are handled by both Torts Division attorneys and by attorneys assigned to the Civil Bureau. CRAB cases are distributed among all Civil Bureau attorneys.

At the end of the fiscal year, the division had 1,045 open cases and was supervising 58 claims against the Commonwealth where the Attorney General acts as executive officer. There were 349 new cases, with 274 cases closed.

During FY 1988, 87 cases were settled without trial. Dismissals or summary judgments on behalf of the Commonwealth were obtained in 163 cases and 25 cases were tried.